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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER and MEDIA ACCESS PROJECT,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether Congress has mandated in the Communications Act of 1934 that broadcast licensees act as public trustees to afford a reasonable opportunity for the discussion of conflicting views on issues of public importance, or whether this requirement may be discarded by the Federal Communications Commission in its sole reasonable discretion.

PARTIES BELOW

The petitioners here, Telecommunications Research and Action Center, and Media Access Project, were petitioners below. The respondents below and here are the Federal Communications Commission and the United States of America. Intervenors below in support of respondents were the National Association of Broadcasters, Public Broadcasting Service and American Newspaper Publishers Association.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	17
APPENDIX	1a
Opinion of the United States Court of Appeals for the District of Columbia Circuit	1a
Report and Order of the Federal Communications Commission	39a
Memorandum Opinion and Order of the Federal Communications Commission denying rehearing	109a
Order of the Court of Appeals denying rehearing	135a
Order of the Court of Appeals denying rehearing *en banc* with separate statements	137a
Judgment of the Court of Appeals	152a

TABLE OF AUTHORITIES

CASES:	Page
Brandywine-Mainline Radio, Inc. v. FCC, 473 F.2d 16 (D.C. Cir. 1972), *cert. den.* 412 U.S. 922 (1973)	14
CBS, Inc. v. FCC, 453 U.S. 367 (1981)	9
Meredith Corporation v. FCC, No. 85-1723, D.C. Cir., January 16, 1987, pet. for rehearing pending	11
NCCB v. FCC, 567 F.2d 1095 (D.C. Cir. 1975), *cert. den.* 436 U.S. 926 (1978)	14
Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)	10
Office of Communication of United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969)	10
Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983)	10
Radio-Television News Directors Association v. FCC, No. 85-1691, D.C. Cir., January 16, 1987	11
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	*passim*
United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y., 1943), affirmed, 326 U.S. 1 (1945)	17
STATUTES AND REGULATIONS:	
28 U.S.C. § 2342	3
Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 *et seq.*:	
§ 153(b)	4,7
§ 153(o)	4,7
§ 312(a)(7)	4,9
§ 315(a)	*passim*
§ 402(a)	3
Federal Communications Commission Regulations	

Table of Authorities Continued

	Page
47 CFR 73.1910	14
47 CFR 73.1920	15
47 CFR 73.1930	12
AGENCY RULINGS, REPORTS, ETC.	
CBS, Inc. (Lar Daly), 26 F.C.C. 715 (1959)	12
Deregulation of Radio, 84 F.C.C. 2d 968 (1981), affirmed *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983)	10
Fairness Doctrine Inquiry, 74 F.C.C. 2d 163 (1979)	14
Fairness Doctrine Report, 102 F.C.C. 2d 143 (1985)	11,14
Fairness Report, 48 F.C.C. 2d 1 (1974), affirmed *sub nom. NCCB v. FCC*, 567 F.2d 1095 (D.C. Cir. 1975), *cert. den.* 436 U.S. 926 (1978)	14
In re Complaint of Syracuse Peace Council, FCC 87-33, January 23, 1987	11
In re Nicholas Zapple, 23 F.C.C. 2d 707 (1970)	12
Notice of Proposed Rulemaking, Docket No. 81-741, 46 Fed. Reg. 60851	3
MISCELLANEOUS	
105 Cong. Rec. 17778	15
105 Cong. Rec. 17830-31	15
H. Rep. No. 1069, 86th Cong., 1st Sess. (1959)	15
S. Rep. No. 562, 86th Cong., 1st Sess. (1959)	15
S. Rep. No. 772, 69th Cong., 1st Sess. (1926)	16
Webster's Third New International Dictionary (1981 ed.) p. 2487	13

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is not yet reported. The orders of the Court of Appeals denying rehearing and rehearing *en banc* (App. 135a, 137a) are unreported. The Report and Order of the Federal Communications Commission (App. 39a) is reported at 48 Fed. Reg. 27054 and 53 Pike & Fischer, Radio Reg. 2d 1309. The Commission's Memorandum Opinion and Order denying rehearing (App. 109a) is reported at 101 F.C.C. 2d 827, 57 Pike & Fischer, Radio Reg. 2d 842.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1986 (App. 152a). Rehearing and rehearing *en banc* were denied on December 16, 1986. (App. 135a, 137a) The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2350(a).

STATUTE INVOLVED

The pertinent portion of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 *et seq.* is as follows:

Section 315(a) (47 U.S.C. § 315(a)):

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
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> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT OF THE CASE

This petition seeks review of the judgment below[1] to the extent that it affirmed orders of the Federal Communications Commission (hereinafter the Commission) refusing to apply the so-called fairness doctrine to teletext, a new television broadcast service which provides for the transmission to the home receiver of textual and graphic material. The court held that a broadcaster's responsibility to act as a public trustee, giving adequate coverage to public issues with a reasonable opportunity for the expression of opposing views, is not mandated by the Communications Act and may be continued or discarded as the Commission's own reasonable judgment dictates. The facts are as follows:

Following the receipt of public comment upon a Notice of Proposed Rulemaking (46 Fed. Reg. 60851 (1981)), the Commission by a Report and Order released May 20, 1983 (App. 39a) adopted rules pro-

[1] The Court of Appeals had jurisdiction pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and 28 U.S.C. § 2342.

viding for a new television broadcast service[2] called teletext. Teletext is the over-the-air transmission to home television receivers (equipped with decoders which may be bought in retail stores) of textual and graphic material. Since textual and graphic material is now transmitted by television broadcast stations, the technologically novel element of teletext, as the Court of Appeals noted (App. 3a), is its utilization of an otherwise unused portion of the television broadcast signal pattern. Teletext signals are transmitted in the minute time periods between the pulses of regular television broadcasting signals. These "vertical blanking intervals" are used for the pulses that constitute teletext transmission, so that a viewer with the appropriate decoder may receive the teletext transmissions in lieu of the "main signal" transmission. While teletext is still largely experimental, several services are in operation; teletext is expected to provide such consumer and business-oriented applications as "news, weather reports, comparative shopping prices, entertainment schedules, closed captions for the hearing impaired, and business-oriented information." (App. 40a.)

The Commission determined not to apply to teletext the broadcast requirements for reasonable access by candidates for federal office, 47 U.S.C. § 312(a)(7), and for equal opportunity in the use of broadcast facilities by all legally qualified candidates for the

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[2] While the Commission had concluded that teletext was an "ancillary service" and not "traditional broadcast" service within the meaning of the statute (App. 65a), the Court of Appeals held that teletext fell clearly within the definition of "broadcasting" contained in the Act (App. 27a-29a). See 47 U.S.C. §§ 153(o) and 153(b), and *infra*, p. 7.

same office at the "lowest unit charge" of the station for that class of time, 47 U.S.C. § 315(a). (App. 65a-67a.)

With particular respect to the fairness doctrine requirements that broadcast stations provide adequate coverage of issues of public importance and fairly reflect differing viewpoints, the Commission was of the view that Congress had merely "ratified" the fairness doctrine when it amended Section 315(a) in 1959 to exempt certain news-related programs from the equal opportunity requirement and added the proviso that this exemption is not to be "construed as relieving broadcasters . . . from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315(a). [Pub. Law No. 86-274, 73 Stat. 557.] The Commission stated that Congress did not "require nor prohibit possible extensions of that policy in the future" to "services like teletext, which did not even exist at the time . . . ." (App. 68a.) The Commission was also reluctant to "extend" fairness policies without a compelling reason, in light of the important First Amendment considerations involved. (App. 68a.) The Commission further stated that it "reach[ed] the same conclusion even if we assume, *arguendo*, that the 1959 amendment functioned to incorporate the Fairness Doctrine as a statutory requirement since, regardless of how Congress' action is characterized, it seems clear that novel services such as teletext were beyond its scope." (App. 68a.)

Finding that application of the fairness doctrine to new technologies was discretionary, the Commission

exercised this claimed discretion by refusing to apply the fairness doctrine to teletext, its "determination stem[ming] primarily from a recognition that teletext's unique blending of the print medium with radio technology fundamentally distinguishes it from traditional broadcast programming." (App. 69a) It stated that the special First Amendment treatment given broadcasting by this Court was based largely upon the premise that broadcast frequencies are limited, a rationale at whose heart is an "[i]mplicit . . . assumption that broadcasters, through their access to the radio spectrum, possess a power to communicate ideas through sound and visual images in a manner that is significantly different from traditional avenues of communication because of the immediacy of the medium." (App. 69a.) This rationale, it found, did not apply to teletext, which it deemed more akin to print media. (App. 69a-70a.)[3]

In a Memorandum Opinion and Order released January 24, 1985 (App. 109a), the Commission, to the extent relevant here, denied reconsideration. With respect to its refusal to apply the various "content-related broadcast laws, policies and rules" to teletext, the Commission re-emphasized that they were adopted when teletext was still unknown, that teletext re-

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[3] Commissioner Jones concurred, noting her inability to follow the permission given broadcast licensees to use the vertical blanking interval for teletext while exempting teletext from broadcast regulation. (App. 100a.) Commissioner Rivera, joined by Commissioner Fogarty, dissented in part on a ground not relevant here. (App. 103a.) Commissioner Sharp concurred, noting in part that if considering the vertical blanking interval as part of the broadcast signal invited the full panoply of broadcast regulation, he was prepared to accept it. (App. 105a.).

mained experimental in terms of the range of its potential uses, and that even when teletext was offered in a "broadcast mode" and "transmitted at some point through the use of the electromagnetic spectrum," it was "an ancillary service" whose "primary and overriding feature will be its historical and cultural connection to the print media, especially books, magazines and newspapers .... [T]he content regulations created for traditional broadcast operations are simply out of place in this new print-related textual data transmission medium." (App. 117a-118a.)

The Court of Appeals reversed the Commission's refusal to apply to teletext the requirements of the statute relating to equal opportunity in the use of broadcast facilities by legally qualified candidates for public office, finding that teletext is plainly "traditional broadcast service" within the meaning of Sections 153(o) and 153(b) (App. 26a-29a.)[4] It thus rejected the Commission's view that Section 315 did not apply to teletext on the theory that it is a new service not contemplated by Congress when the statute was written. It also held that, contrary to the Commission's view, a candidate could "use" teletext within the meaning of Section 315.[5]

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[4] Section 153(o) defines "broadcasting" as "the dissemination of radio communications intended to be received by the public...." Section 153(b) defines "radio communication" as the "transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

[5] The Court of Appeals suggested that the Commission's current rules defining "use" in terms of a personal appearance by

The lower court sustained the Commission's refusal to apply the fairness doctrine to the broadcast use of teletext,[6] on the ground that the fairness doctrine is not statutorily mandated. It agreed with the Commission's premise that Congress never actually codified the Commission's fairness doctrine, and that the Commission, therefore, had no obligation to extend its own policy to new services like teletext. (App. 34a-35a.) The 1959 amendment to Section 315, stated the court, "neither creates nor imposes any obligation, but seeks to make it clear that [it] does not affect the fairness doctrine obligation as the Commission had previously applied it." (App. 34a.)

The court also concluded that, while in light of this Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) , sustaining the constitutionality of the fairness doctrine as applied to broadcasting, and the lower court's own holding that teletext is broadcasting, the Commission could not reject fairness in regulating teletext on the basis of the First Amendment implications flowing from its textual nature (App. 10a-18a), the Commission had rationally concluded as a matter of policy judgment that fairness should not be required for teletext because it might well impede the development of the new technology.[7] (App. 36a-37a.)

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voice or picture might have to be amended to suit the qualities of the new service. It also found that teletext is in any event capable of reproducing a recognizable image of a candidate. (App. 29a-31a.)

[6] If a teletext operation were conducted as a common carrier undertaking, e.g., distributing newspaper copy for hire, fairness obligations obviously would not be involved.

[7] We see nothing in the Commission's decision to justify this

Senior Circuit Judge MacKinnon dissented with respect to the Section 312(a)(7) requirement of reasonable access to teletext by legally qualified candidates for federal office and the applicability of the fairness doctrine. (App. 38a.)

A petition for rehearing was denied on December 16, 1986 (App 135a); on the same day, a suggestion for rehearing *en banc* was denied, with two judges not participating and five judges of the nine participating voting for rehearing *en banc*. (App. 137a.) Statements by Judge Mikva (for), joined by Judge Edwards, and by Judge Bork (against) were attached. Judge Starr, joined by Judges Robinson and Ruth B. Ginsburg, stated that they dissented without addressing the merits, because of the importance of the issue. (App. 139a-151a.)[8]

REASONS FOR GRANTING THE WRIT

The issue presented is of fundamental importance in administering the Communications Act and insur-

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conclusion, but do not raise this question.

The Court of Appeals sustained the Commission's refusal to apply to teletext the requirements of Section 312(a)(7) of the Communications Act, 47 U.S.C. § 312(a)(7)—that broadcast licensees allow reasonable access to candidates for federal elective office—as a reasonable application of the statute. (App. 18a-25a.) Petitioners believe that the Commission arbitrarily exempted television licensees from Section 312(a)(7) responsibilities without awaiting concrete situations of licensee responses to requests for time. See *CBS, Inc. v. FCC*, 453 U.S.367 (1981). However, we do not seek further review on this issue since, unlike the fairness aspect, it does not undermine the entire public fiduciary concept.

[8] Judge MacKinnon, as a Senior Judge, did not participate in the vote on the suggestion for rehearing *en banc*.

ing that the public airwaves will not be closed to a variety of viewpoints on public issues. Under the governing public interest standard of the Communications Act, " . . . the award of a broadcasting license should be a 'public trust'." *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413 , 1427 (D.C. Cir. 1983).[9] That public trust includes a bedrock duty " . . . to present informational programming." *Id.* at 1429.[10] And finally it must include a duty to do so fairly: "Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392 (1969). "[A]dherence to the Fairness Doctrine is a *sine qua non* of every licensee," as former Chief Justice (then Judge) Burger stated in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1009 (D.C. Cir. 1966). Without the fairness doctrine, the Jackson, Mississippi, television licensee in that case who presented only the segregationist point of view on the then-burning issue of integration in a community with a deeply concerned

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[9] See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969); *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969) (broadcasters are "fiduciaries—of a great public resource. . .").

[10] See also *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 377; *Deregulation of Radio*, 84 F.C.C. 2d 968, 982 (1981) (because of the "bedrock obligation contemplated by the 'public interest'," the Commission's focus at renewal is upon only one programming category, "issue-oriented" programming), aff'd, *Office of Communication of United Church of Christ v. FCC, supra*, 707 F.2d at 1426-1430.

45% black population would have been renewed as a public fiduciary for the community. Yet the court below held that the Act imposes upon broadcast licensees no obligation to cover public issues or, doing so, to present contrasting viewpoints.

It is not speculation that the bedrock public interest standard will be undermined by the decision below. The Commission has already announced its considered view that "the fairness doctrine no longer serves the public interest" (Fairness Doctrine Report, 102 F.C.C. 2d 143, 246 (1985)), and is addressing the issue in a fairness doctrine complaint proceeding.[11] If the decision of the court below is not set aside, the Commission's action discarding the fairness doctrine will be in effect until a future case can come before this Court. This period of uncertainty and confusion will include 1988, an election year.[12] Such substantial in-

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[11] See *In re Complaint of Syracuse Peace Council*, FCC 87-33, issued January 23, 1987, calling for public comment by February 25, 1987 on whether the doctrine is constitutional or serves the public interest. This action stemmed from the decision of the Court of Appeals in *Meredith Corporation v. FCC*, No. 85-1723, D.C. Cir., January 16, 1987, petition for rehearing pending, requiring the Commission to consider the constitutional arguments raised unless ". . . it concludes that in light of its Fairness Report it may not or should not enforce the doctrine because it is contrary to the public interest." (Slip. Op. 22.) See also *Radio-Television News Directors Association v. FCC*, No. 85-1691, D.C. Cir., decided January 16, 1987, in which the Court of Appeals denied a motion to dismiss a petition for review challenging the Commission's refusal to institute rulemaking to eliminate or modify the fairness doctrine.

[12] The equal opportunities provision of Section 315(a) applies only to non-exempt appearances of candidates for public office. The fairness doctrine covers all exempt appearances, use of the

jury to the public interest should be avoided, and can be, since the legal issue in this case is fully ripe for consideration and can be readily disposed of.

The decision below is so clearly incorrect as to warrant summary reversal. It is inconsistent with the statutory language and its legislative history, and with a prior holding of this Court. Thus, the lower court's holding denies significance to express language in 1959 amendments to the statute stating that fairness is a public interest obligation. Congress amended Section 315 of the Communications Act in 1959 to relieve broadcasters of an overly rigid Commission interpretation[13] of the provisions of that section granting "equal time" rights to candidates in the use of broadcast facilities. It did so by exempting from the equal time requirements certain news and news-related programs. It took care, however, to preserve the fairness obligation by adding the proviso that:

> . . . Nothing in the foregoing sentence shall be construed as relieving broadcasters [in connection with such programs] from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Congress thus deliberately linked the public interest requirement with the two-fold fairness obligation—to present public issues, and to do so fairly. The entire

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station's facilities by supporters of candidates (*In re Nicholas Zapple*, 23 F.C.C. 2d 707 (1970)), ballot issues, and political editorializing (47 CFR 73.1930).

[13] See *CBS, Inc. (Lar Daly)*, 26 F.C.C. 715 (1959).

thrust of the proviso is that the two are integrally related—not separate as the court below held. And, while the lower court rested its holding that the statute does not require fairness almost entirely upon the use of the word "under" in Section 315, concluding that it "suggested" merely an authorization to the Commission (see App. 35a), we believe that the parallel use in the amendment of "under" with reference to the obligation to operate in the public interest "and" the obligation to present conflicting views on public issues plainly means that, in this context, "under" means "by." It cannot be suggested that the former obligation is not imposed "by" the Act.[14]

This Court has already resolved the question in *Red Lion, supra,* 395 U.S. at 394, when it concluded that "Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect." The Court specifically found that the proviso quoted above:

> . . . makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated

[14] Further, since a common meaning of "under" is "required by," Webster's Third New International Dictionary (1981 ed.), p. 2487, there is no apparent basis for rejecting this meaning out of hand without at least some investigation of legislative intent. No such investigation was made in the opinion below.

> the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.[15]

We recognize that *Red Lion* also refers to the "natural conclusions" that "the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues" and that the Commission "is free to implement this requirement by reasonable rules and regulations that do not abridge free speech." 395 U.S. at 382. No more was required to resolve the claim that the statute did not authorize the personal attack rules—Commission corollaries to the fairness doctrine—which were specifically challenged in that proceeding.[16] We submit that an informed reading of the

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[15] This is not a case where the lower court has affirmed a consistent agency interpretation. To the contrary, both the Court of Appeals and the Commission have recognized that fairness is a statutory obligation. E.g., *NCCB v. FCC*, 567 F.2d 1095, 1107 (D.C. Cir. 1975), *cert. den.* 436 U.S. 926 (1978); *Brandywine-Mainline Radio, Inc. v. FCC*, 473 F.2d 16, 46 (D.C. Cir. 1972), *cert. den.* 412 U.S. 922 (1973); *Fairness Report*, 48 F.C.C. 2d 1, 6, n.6 (1974), affirmed *sub nom. NCCB v. FCC, supra*; *Fairness Doctrine Inquiry*, 74 F.C.C. 2d 163, 178 (1979). Indeed, the different view expressed by the Commission in this case was subsequently weakened in its *Fairness Doctrine Report*, 102 F.C.C. 2d 143, 227-246 (1985), stating that "whether or not Congress has mandated our retention of the fairness doctrine" was a difficult issue which the Commission would not resolve at that time. The Commission's own rules state that "[t]he Fairness Doctrine is contained in section 315(a) of the Communications Act of 1934, as amended. . . ." See 47 CFR 73.1910.

[16] These rules, 47 CFR 73.1920, require that where a personal

opinion leaves no reasonable doubt that in deciding the precise issue before it, the Court rested its holding upon a ground that is conclusive here.

The legislative history of the 1959 amendments, extensively reviewed by this Court in reaching its conclusions, shows the intent of Congress to require fairness, and not to leave it to the Commission's judgment of its utility. As the Court noted (395 U.S. at 383-84), the Senate Report on the amendments, even before the proviso quoted above was added, described broadcast frequencies as a public trust, with the licensee mandated to "operate in the public interest and [assume] the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., pp. 8-9 (1959). This report referred in terms both to policy and "existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy." S. Rep. No. 562, *supra*, p. 13.[17] But Congress did not leave the matter to committee reports; it put the duty in the statute.

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attack is made in the context of discussion of a controversial issue of public importance, the person attacked must be afforded an opportunity to respond. Normally, the licensee chooses the spokesperson for differing viewpoints.

[17] See also H. Rep. No. 1069, 86th Cong., 1st Sess., at p. 5 (1959) (language in 315(a) "is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934"); see statements of the bill's managers at 105 Cong. Rec. 17778, 17830-31, as to the binding effect of the amendment.

Yet the court below, with no reference to legislative history[18] and, as far as the statute is concerned, relying almost entirely upon the use of the word "under" in the 1959 amendments, concluded that fairness is not a Congressional command. This superficial and incorrect examination of the question[19] imports to Congress an almost frivolous intent, an expression of indifference as to whether or not broadcasters keep the public reasonably informed on controversial public issues. Such an intent is belied not only by the common sense reading of the statute and the legislative history cited above showing an intense and clear Congressional purpose, but obviously cannot stand where this Court has already found that Congress ratified with positive legislation the administrative

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[18] The separate statement of Judge Bork in support of the denial of rehearing *en banc* incorrectly states (App. 145a) that Congress specifically rejected proposals to include the fairness doctrine in the 1927 act. The proposal referred to was to make licensees common carriers as to public questions for the discussion of which the licensee permitted the station to be used. S. Rep. No. 772, 69th Cong., 1st Sess., at p. 4 (1926). The requirement was not considered workable, since a station would have to give time to anyone who presented himself. The fairness doctrine gives the licensee much more discretion in choosing spokespeople. Nor are other proposals for "equal opportunity" germane, since the fairness doctrine has never required equal opportunity for the discussion of conflicting views on public issues. Such a scheme was soundly judged infeasible by the Congress.

[19] While the court speaks at one point of the Commission's power to "alter" the fairness obligation (App. 34a), its holding is that the Commission may discard the obligation entirely. The Commission's authority to modify the obligation in terms of such matters as retention of the personal attack corollary and procedures for enforcement is not at issue in this case.

construction that fairness is inherent in the public interest standard. *Red Lion*, 395 U.S. at 381-83.

CONCLUSION

The decision below is patently inconsistent with this Court's existing interpretation of the Communications Act on a question of vital importance to the American people.[20] Few issues are apt to loom much larger in a nation which, as Judge Learned Hand put it, has staked its all upon the First Amendment principle "that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y., 1943), affirmed, 326 U.S. 1 (1945).

It is respectfully submitted that the petition for a writ of certiorari should be granted, and it is further

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[20] It may also be noted here that the majority below, in a *dubitante* discussion of the constitutionality of the fairness doctrine, mistakenly gave the Commission credit for devising an "immediacy" rationale to avoid what the majority saw as the weakness of the "scarcity rationale" for sustaining the constitutionality of the fairness doctrine. (App. 13a-14a) However, the court below itself seriously misperceived the constitutional basis for the fairness doctrine. It has never been the scarcity of radio frequencies or broadcast outlets *per se* that justifies a fairness obligation, but rather the resulting permissible government licensing. It is the First Amendment rights of those who are necessarily denied a license that permits a requirement that broadcasters act as fiduciaries. *Red Lion*, 395 U.S. at 386-90. If a comparison is to be made with the print media, it can only be validly made in contemplation of a hypothetical scarcity of printers ink or paper so severe that the government was forced to provide it to a relative handful of publishers and to deny it to all others.

submitted that the decision below warrants summary reversal insofar as it holds that the Federal Communications Commission has authority to relieve broadcast licensees of the duty to operate in the public interest and to afford a reasonable opportunity for the discussion of conflicting views on issues of public importance. This holding cripples Congress' attempt to preserve the public's interest in the use of the airwaves for broadcasting.

Respectfully submitted,

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February 1987

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1160

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER AND MEDIA ACCESS PROJECT, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF BROADCASTERS, PUBLIC BROADCASTING SERVICE, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, INTERVENORS

Petition for Review of an Order of the Federal Communications Commission

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Argued February 20, 1986

Decided September 19, 1986

Robert M. Gurss, with whom *Andrew Jay Schwartzman* and *Henry Geller* were on the brief for petitioners.

C. Grey Pash, Jr., Counsel, Federal Communications Commission, with whom *Jack D. Smith*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, *John J. Powers, III* and *Margaret G. Halpern*, Attorneys, Department of Justice, were on the brief for respondents.

Richard E. Wiley, Michael Yourshaw, William B. Baker and *W. Terry Maguire* were on the brief for intervenor, American Newspaper Publishers Association.

Henry L. Baumann, Michael D. Berg and *Steven A. Bookshester* entered appearances for intervenor, National Association of Broadcasters.

Peter Tannenwald, Lawrence A. Horn and *Barbara S. Wellbery* entered appearances for intervenor, Public Broadcasting Service.

Before: BORK and SCALIA, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BORK.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* MACKINNON.

BORK, *Circuit Judge*: Petitioners challenge the Federal Communications Commission's decision not to apply three forms of political broadcast regulation to a new technology, teletext. Teletext provides a means of transmitting textual and graphic material to the television screens of home viewers.

The Communications Act of 1934, 47 U.S.C. § 312 (a)(7) (1982), requires broadcast licensees to "allow reasonable access . . . for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." In addition, under 47 U.S.C. § 315(a) (1982), if the licensee "permit[s] any

person who is a legally qualified candidate for any public office to use a broadcasting station," he or she incurs the additional obligation of "afford[ing] equal opportunities to all other such candidates for that office." Complementing these statutory provisions, there exists a form of political broadcast regulation that the Commission created early in its history in the name of its mandate to ensure the use of the airwaves in the "public 'convenience, interest, or necessity.'" *See Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 376-77 (1969). The "fairness doctrine," as this policy is known, "provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 C.F.R. § 73.1910 (1985).

The case before us presents the question whether the Commission erred in determining that these three political broadcast provisions do not apply to teletext. Because we find that the Commission acted reasonably with respect to section 312(a)(7) and the fairness doctrine, but erroneously held section 315 not to apply to teletext, we affirm in part and reverse in part, and remand to the Commission for further proceedings.

I.

The technologically novel element of teletext service is its utilization of an otherwise unused portion of the television broadcast signal. Television signals are not continuous but are sent in pulses. The human eye retains the image from one pulse to the next so that the picture is perceived as uninterrupted. The time between the pulses of regular television broadcasting ("main signal" transmission) is known as the "vertical blanking interval," and can be used for pulses that constitute teletext transmission. As treated by the Commission in the docket now before us, "teletext" refers exclusively to such over-the-air transmissions, and not to transmission of text and graphics by way of cable or telephone. Main

signal operators now control and operate teletext, though the FCC has authorized the operation of teletext "on a franchise basis" or through the "leas[ing] of space to multiple users." *See Report and Order*, 53 Rad. Reg. 2d (P & F) 1309, 1321 (1983). The Commission, however, admonished licensees "that they remain responsible for all broadcast related teletext provided via the station's facilities, whether produced in-house or obtained from outside sources." *Id.*

To receive teletext, the viewer must have a device to decode the signal carrying the textual information and graphics. Currently, viewers may purchase teletext decoders in retail stores selling television sets. In the future, at least some television manufacturers will build decoding equipment into selected television models. Broadcasters of teletext thus have no control over who obtains the ability to decode teletext signals.

The teletext viewer begins typically by watching the display of a table of contents, which indicates what information is available and at which pages it appears. A "page" is a screen of information. Viewers may then view the information they want by flipping to the page where the desired material appears. Present teletext programming includes data of general interest such as news, sports, weather, community events, and advertising, though nothing precludes broadcasters from displaying information that appeals to audiences with special interests. Main channel broadcasting may notify viewers of material available on teletext. While teletext can display text and high-resolution graphics, no sound accompanies the visual transmissions under teletext technology. Teletext is supported by advertiser fees and involves no charge to the public.

On November 27, 1981, the FCC released a Notice of Proposed Rulemaking to explore possible authorization for television stations to operate teletext systems. *See* 46 Fed. Reg. 60,851 (1981). The Commission announced

its goal "to provide a regulatory environment that is conducive to the emergence and implementation of new technology and new uses of the [broadcast] spectrum." *Id.* The Commission added that "[i]n the case of teletext, the available evidence appears to indicate that the forces of competition and the open market are well suited to obtaining the kinds and amounts of service that are most desirable in terms of the public interest." *Id.* at 60,852. The Notice therefore proposed that "teletext . . . be treated as an anciallary [sic] service" and that "[s]tations . . . not be required to observe service guidelines or other performance standards." *Id.* at 60,853.

In its *Report and Order*, 53 Rad. Reg. 2d (P & F) 1309 (1983), the Commission addressed the applicability of political broadcast requirements to teletext and concluded that "as a matter of law, . . . sections [312(a)(7) and 315] need not be applied to teletext service," and that applying these provisions would be "both unnecessary and unwise as a matter of policy." *Id.* at 1322. Moreover, the Commission "conclude[d] that the Fairness Doctrine should not be applied to teletext services." *Id.* at 1324. Thus, the *Report and Order* sought to adopt an approach of non-regulation of teletext under any of the political broadcasting provisions administered by the FCC.

The Commission noted that section 312(a)(7) guarantees federal candidates only " 'reasonable access' " to "a broadcasting station" and considered what access would be "reasonable" when dealing with "variant broadcast services" such as teletext. *See* 53 Rad. Reg. 2d (P & F) at 1322. Relying on *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act of 1934*, 68 F.C.C.2d 1079, 1093 (1983), the FCC suggested that by providing a candidate access to the broad television audience attracted to the station's regular broadcast operation a licensee satisfied its section 312(a)(7) duties even if the broadcaster at the same time denied access

to the more limited audience viewing the "ancillary or subsidiary" teletext service. *See* 53 Rad. Reg. 2d (P & F) at 1322-23.

In contrast, the Commission found section 315 wholly inapposite to teletext. Noting that a broadcast "use" triggered section 315's substantive obligations, that a "use" required "a personal appearance by a legally qualified candidate by voice or picture," and that the textual and graphics nature of teletext made it "inherently not a medium by which a candidate [could] make a personal appearance," the Commission held that teletext could not trigger the requirements of section 315. *See* 53 Rad. Reg. 2d (P & F) at 1323. The Commission also reasoned that teletext differed from "traditional broadcast programming" because it does not have the powerful audio-visual capabilities of main-channel broadcasting, and, therefore, does not pose the danger of "abuse" of these powerful sound and image "uses" that Congress envisioned in enacting section 315. *See id.*

The Commission reserved its most elaborate analysis for the fairness doctrine. It began with the contention that the fairness doctrine is a Commission-made policy, and that Congress did not codify the fairness doctrine when it added language recognizing that policy in the course of a 1959 amendment to section 315. 53 Rad. Reg. 2d (P & F) at 1323. Thus, the 1959 amendment does not compel extension of the fairness doctrine to "new services . . . which did not even exist" at the time, and applications of the doctrine to serve the public interest rests in the Commission's "sound judgment and discretion." *See id.*

The Commission then determined that it should not apply the fairness doctrine to teletext, "primarily [because of] a recognition that teletext's unique blending of the print medium with radio technology fundamentally distinguishes it from traditional broadcast programming." 53 Rad. Reg. 2d (P & F) at 1324. Noting that

"scarcity" of broadcast frequencies provided the first amendment justification of the fairness doctrine's application to traditional broadcast media, the Commission posited an "[i]mplicit . . . assumption that . . . power to communicate ideas through sound and visual images . . . is significantly different from traditional avenues of communication because of the immediacy of the medium." *Id.* In other words, because scarcity inheres in all provisions of goods and services, including the provision of information through print media, the lessened first amendment protection of broadcast regulation must also rely upon the powerful character of traditional broadcasting. Because teletext "more closely resembles . . . other print communication media such as newspapers and magazines," the Commission found the "scarcity" rationale, as reinterpreted, insufficient to justify regulating teletext.

The Commission also reasoned that teletext, as a print medium in an "arena of competition . . . includ[ing] all other sources of print material," would not encounter the same degree of scarcity, in the usual sense, as the sound and visual images of regular programming. *See* 53 Rad. Reg. 2d (P & F) at 1324. Thus, the Commission felt it constitutionally suspect to apply the fairness doctrine to teletext. And, in light of its obligation to "encourage, not frustrate, the[] development" of new services like teletext, the FCC decided, therefore, to heed concerns of commenters that teletext services might not prove "viable if . . . burdened by Fairness Doctrine obligations" and to exempt teletext from the fairness doctrine. *See id.*

Two motions for reconsideration of the decision not to apply content regulation to teletext were filed. Media Access Project ("MAP"), a petitioner in this appeal, argued that "[t]eletext . . . is intended for the general public," and, therefore, falls within the definition of "broadcasting" in the Communications Act of 1934 and

triggers broadcast regulation. *See* J.A. at 111-12. MAP argued that section 312(a)(7) required a licensee " 'to tailor [its] responses [to requests for air time] to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time,' " an individualized approach inconsistent with the sweeping holding of the *Report and Order*. *See* J.A. at 112 (citing *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U.S. 367, 387 (1981)). MAP generally contended that teletext had broad audience potential, a good capacity to convey political information, and that the Commission must ensure access to teletext service. *See id.* at 113.

With respect to section 315, MAP took issue with the FCC's view that teletext does not meet the standards for a "use." First, MAP argued that teletext could "produce graphic images, including . . . perfectly recognizable portraits of . . . candidates," and, therefore, met the Commission's prior definition of a "use" as " 'any broadcast or cablecast of a candidate's voice or picture.' " *See* J.A. at 116, 117. But even if teletext had not possessed such visual capabilities, MAP urged that the Commission would have a duty to redefine "use" to account for this new form of broadcasting technology. *See* J.A. at 117.

As for the fairness doctrine, MAP contended that "[t]he standard of fairness . . . inheres in the public interest standard" the FCC is charged with enforcing, and that by the 1959 amendments "Congress did not merely 'ratify' the Commission's fairness doctrine . . . [but] clearly made [it] a binding part of the statute." J.A. at 118, 119. MAP argued, therefore, that the FCC lacked the discretion to refuse to apply the fairness doctrine to teletext broadcast operations.

The other Petition for Reconsideration, filed by Henry Geller, Donna N. Lampert, and Philip A. Rubin, made many of the same legal arguments put forward by MAP.

Their petition added that the characterization of "teletext as 'ancillary,' 'novel,' or 'a print medium' " could not avoid the requirements of political broadcast regulation, and that the scarcity doctrine had nothing to do with the "immediacy" of traditional broadcasting's sounds and images. J.A. at 126-27 & n.6. This petition also urged that the full panoply of political broadcasting regulation be applied to teletext.

On November 8, 1984, the Commission rejected these petitions in a *Memorandum Opinion and Order*, 101 F.C.C.2d 827 (1985). While the *Memorandum Opinion and Order* largely rehearsed the points made in the Commission's earlier decision, the Commission elaborated upon the legal relevance of the differences between teletext and traditional broadcasting:

> We consider teletext clearly as an ancillary service not strictly related to the traditional broadcast mode of mass communication. First, the very definition of teletext confined the service to traditional print and textual data transmission. Thus, although these data will be transmitted at some point through the use of the electromagnetic spectrum, its primary and overriding feature will be its historical and cultural connection to the print media, especially books, magazines and newspapers. Users of this medium will not be listening or viewing teletext in any traditional broadcasting sense, but instead will be *reading* it, and thus be able to skip, scan and select the desired material in ways that are incomparable to anything in the history of broadcasting and broadcast regulation. In this light, we believe that the content regulations created for traditional broadcast operations are simply out of place in this new print-related textual data transmission medium. We decline to attribute to Congress an intent to extend broadcast content regulation . . . to this new medium.

Id. at 833 (citations and footnote omitted; emphasis in original).

The Commission also provided further explanation of its first amendment theory and made clear that it meant this theory to cover the applicability of all forms of political broadcasting regulation to teletext. Relying upon *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (striking down a state's newspaper right-of-reply statute as running afoul of the first amendment's protection of editorial judgment and control), and asserting that it considered teletext a "print medium" for first amendment purposes, *see* 101 F.C.C.2d at 834 & n.16, the Commission found that "neither the letter nor the purposes of the First Amendment would be served by . . . a ruling" that would "require[] [the Commission] to intrude into the editorial judgments of teletext editors." *Id.* at 834. Given *Tornillo's* clear refusal to allow interference with editorial judgments in the print media and "the historical sensitivity of Congress to these [first amendment] issues," the Commission would not "construe the intent of Congress to apply Section 315 and similar statutory provisions, and . . . associated rules and policies, to the teletext medium." *Id.* (footnote omitted). Accordingly, the Commission adhered to the results of its earlier *Report and Order.*

On June 3, 1985, the Telecommunications Research and Action Center and the Media Access Project ("TRAC/MAP") filed a petition for review in this court, largely renewing the substantive legal arguments asserted in the petitions for reconsideration below. Because the Commission's interpretation of the first amendment affects its analysis of political broadcasting regulation and teletext at several points, we discuss that interpretation first. We then address the petitioners' contentions with respect to section 312(a)(7), section 315, and the fairness doctrine in that order.

II.

In the Commission's view the regulation of teletext's "unique blend of the print medium with radio technology" raises first amendment problems not associated with the

regulation of traditional broadcasting. Thus, the argument goes, existing Supreme Court precedent upholding political content regulation of traditional broadcasting does not necessarily justify the application of such regulation to the new medium of teletext. While not concluding that this application to a "print medium" like teletext would violate the first amendment, the Commission suggested that its application of that regulation would be sufficiently suspect to justify not imputing to Congress an intent to apply "section 315 and similar statutory provisions, and . . . associated rules and policies, to the teletext medium." 101 F.C.C.2d at 834. To appreciate the Commission's argument, a brief discussion of the case law will be useful.

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Supreme Court rejected a first amendment challenge to the fairness doctrine and related rules governing personal attacks and political editorials by licensees. In reasoning that applies generally to political broadcasting regulation,[1] the Court found justification for limiting first amendment protection of broadcasting in the "scarcity doctrine."[2] Given the fact of a limited

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[1] *Red Lion* expressly noted that the equal-time provision of § 315 was "indistinguishable" "[i]n terms of constitutional principle" from the implementing regulations of the fairness doctrine before the Court. 395 U.S. at 391. While § 312(a)(7) had not yet been enacted at the time of *Red Lion*, it seems clear that the opinion's rationale applies with equal force to that provision, which affects broadcasters in a very similar manner to the fairness doctrine requirement that a broadcaster provide adequate aid time to the discussion of public issues.

[2] The notion that scarcity of broadcast frequencies could provide constitutional justification for broadcast regulation first arose in National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943). In his opinion for the majority, Justice Frankfurter enunciated the scarcity rationale to turn back a first amendment challenge to the FCC's chain broadcasting regulations, which governed the affiliation of stations

number of broadcast frequencies and the "massive" problem of broadcast interference, the Court remarked that "only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology." *Id.* at 388. The Court observed that this necessitated the division of the radio spectrum into usable portions, the assignment of subdivisions of the frequency to individual users, and regulation under which the "Government . . . tell[s] some applicants that they [cannot] . . . broadcast at all because there [is] room for only a few." *Id.* Therefore, the Court asserted, because "there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." *Id.*

Observing that licensees and those who can obtain no license have identical first amendment rights, the Court in *Red Lion* further concluded that

> [t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

395 U.S. at 389. The Court then enunciated the classic formulation of the scarcity doctrine:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a

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with networks. *Id.* Until *Red Lion*, however, the Court had never addressed the question whether the scarcity doctrine could justify regulation of the content of broadcasts.

> whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

Id. at 390. It was on this principle that the Court found no first amendment infirmity in political broadcast regulation.

The Commission believes, however, that the regulation of teletext falls not within the permissive approach of *Red Lion*, but rather within the strict first amendment rule applied to content regulation of the print media. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the Court struck down an editorial right-of-reply statute that applied to newspapers. The content regulation in *Tornillo* bore a strong resemblance to that upheld in *Red Lion*. In *Tornillo* the Court held that such regulation impermissibly interfered with the newspapers' "editorial control and judgment." *Id.* at 258. The Court made the broad assertion that "[i]t has yet to be demonstrated how governmental regulation of this crucial [editorial] process can be exercised consistent with the First Amendment guarantees of a free press." *Id.* If the Commission's view is correct, and *Tornillo* rather than *Red Lion* applies to teletext, that service is entitled to greater first amendment protections than ordinary broadcasting and it would be proper, at a minimum, to construe political broadcasting provisions narrowly to avoid constitutionally suspect results.

The Commission has offered two grounds for its view that *Tornillo* rather than *Red Lion* is pertinent. Both reasons relate to the textual nature of teletext service. First, the Commission read an "immediacy" component into the scarcity doctrine:

> Implicit in the "scarcity" rationale . . . is an assumption that broadcasters, through their access to

> the radio spectrum, possess a power to communicate ideas through sound and visual images in a manner that is significantly different from traditional avenues of communication because of the immediacy of the medium.

53 Rad. Reg. 2d (P & F) at 1324. Second, the Commission held that the print nature of teletext "more closely resembles, and will largely compete with, other print communication media such as newspapers and magazines." *Id.* Under this analysis, scarcity of alternative first amendment resources does not exist with respect to teletext. We address these points in turn.

With respect to the first argument, the deficiencies of the scarcity rationale as a basis for depriving broadcasting of full first amendment protection, has led some to think that it is the immediacy and the power of broadcasting that causes its differential treatment. Whether or not that is true, we are unwilling to endorse an argument that makes the very effectiveness of speech the justification for according it less first amendment protection. More important, the Supreme Court's articulation of the scarcity doctrine contains no hint of any immediacy rationale. The Court based its reasoning entirely on the physical scarcity of broadcasting frequencies, which, it thought, permitted attaching fiduciary duties to the receipt of a license to use a frequency. This "immediacy" distinction cannot, therefore, be employed to affect the ability of the Commission to regulate public affairs broadcasting on teletext to ensure "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion*, 395 U.S. at 390.

The Commission's second distinction—that a textual medium is not scarce insofar as it competes with other "print media"—also fails to dislodge the hold of *Red Lion*. The dispositive fact is that teletext is transmitted over broadcast frequencies that the Supreme Court has

ruled scarce and this makes teletext's content regulable. We can understand, however, why the Commission thought it could reason in this fashion. The basic difficulty in this entire area is that the line drawn between the print media and the broadcast media, resting as it does on the physical scarcity of the latter, is a distinction without a difference. Employing the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results.

It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another.[3] The attempt to

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[3] As Professor Ronald Coase has observed,

> it is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.

Coase, *The Federal Communications Commission*, 2 J.L. & Econ. 1, 14 (1959).

use a universal fact as a distinguishing principle necessarily leads to analytical confusion.[4]

Neither is content regulation explained by the fact that broadcasters face the problem of interference, so that the government must define useable frequencies and protect those frequencies from encroachment. This governmental definition of frequencies is another instance of a universal fact that does not offer an explanatory principle for differing treatment. A publisher can deliver his newspapers only because government provides streets and regulates traffic on the streets by allocating rights of way. Yet no one would contend that the necessity for these governmental functions, which are certainly analogous to the government's function in allocating broadcast frequencies, could justify regulation of the content of a newspaper to ensure that it serves the needs of the citizens.

There may be ways to reconcile *Red Lion* and *Tornillo* but the "scarcity" of broadcast frequencies does not appear capable of doing so. Perhaps the Supreme Court will one day revisit this area of the law and either eliminate the distinction between print and broadcast media, surely by pronouncing *Tornillo* applicable to both,

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[4] One might attempt to resolve the tension between *Tornillo* and *Red Lion* on the ground that, while scarcity characterizes both print and broadcast media, the latter must be operating under conditions of greater "scarcity" than the former. This, however, is unpersuasive. There is nothing uniquely scarce about the broadcast spectrum. Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), and it appears that currently "the number of broadcast stations . . . rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried." Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir.), *cert. denied*, 464 U.S. 1008 (1983). Indeed, many markets have a far greater number of broadcasting stations than newspapers.

or announce a constitutional distinction that is more usable than the present one. In the meantime, neither we nor the Commisison are free to seek new rationales to remedy the inadequacy of the doctrine in this area. The attempt to do that has led the Commission to find "implicit" considerations in the law that are not really there. The Supreme Court has drawn a first amendment distinction between broadcast and print media on a premise of the physical scarcity of broadcast frequencies. Teletext, whatever its similarities to print media, uses broadcast frequencies, and that, given *Red Lion*, would seem to be that.[5]

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[5] We do not mean to suggest here that *Red Lion* poses a permanent bar to the dismantling of political broadcast regulation, the soundness of which has come under much well-placed criticism for some time and from many quarters. *See, e.g.*, Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207 (1982); Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213. The Supreme Court has suggested avenues of constitutional attack on political broadcast regulation that remain open to exploration. For example, in *Red Lion* itself, the Court stated that "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be adequate time to reconsider the constitutional implications." 395 U.S. at 393. Moreover, the Court has recently suggested that the advent of cable and satellite technologies may soon render the scarcity doctrine obsolete, but declined to "reconsider [its] long-standing approach [to political broadcast regulation] without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of California, 468 U.S. 364, 376-77 n.11 (1984).

In a recent study of the fairness doctrine, the FCC has attempted to get the Court to reevaluate political broadcast regulation along these lines by undertaking to show both the negative practical impact of the fairness doctrine and the technological erosion of scarcity. *See* Inquiry into Section

The Commission, therefore, cannot on first amendment grounds refuse to apply to teletext such regulation as is constitutionally permissible when applied to other, more traditional, broadcast media. We now turn to the consideration of the particular regulation at issue in this case.

III.

Section 312(a)(7) states that "[t]he Commission may revoke any station license or construction permit . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7) (1982). The question here is the rationality of the Commission's decision about the applicability of this provision to teletext.

At the outset, we state what we understand the Commission's decision to be. In introducing its legal analysis, the Commission stated: "As discussed below, we have concluded that, as a matter of law, . . . sections [312(a)(7) and 315] need not be applied to teletext service." 53 Rad. Reg. 2d (P & F) at 1322. The Commission stated that "the statutory requirement of affording reasonable access is adequately satisfied by permitting federal candidates access to a licensee's regular broadcast operation; it does not require access to ancillary or subsidiary service offerings like teletext." *Id.* The *Report and Order*'s analysis of section 312(a)(7) concluded by stating that the Commission "perceive[d] no legal requirement that licensees grant federal candidates access to their teletext offerings." *Id.* at 1323. Finally, in rejecting reconsideration of this issue in its *Memorandum*

73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985).

Opinion and Order, the FCC asserted: "Guided as we are in such matters by a reasonableness standard, we find that a broadcaster could satisfy the 'reasonable access' rights of a candidate without use of teletext." 101 F.C.C.2d at 834. We find it clear, therefore, that the Commission believes that a broadcaster cannot be deemed to have acted unreasonably under the statute on the ground that he or she adopts a policy refusing to permit any access to teletext. We now turn to our analysis of the Commission's conclusion on this point.

The scope of review in this case is quite narrow. In *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U.S. 367, 386 (1981) ("*CBS*"), the Supreme Court stated that, in enacting section 312(a)(7), Congress "[e]ssentially . . . adopted a 'rule of reason' and charged the Commission with its enforcement." The Court also asserted that Congress "did not give guidance on how the Commission should implement the statute's access requirement." *Id.* In such a case, where Congress has left a gap in the statutory scheme, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984) (footnote omitted). In the determination of whether the agency's decision has run afoul of these standards, the parties challenging the agency action bear the burden of proof. *See San Luis Obispo Mothers for Peace* v. *United States Nuclear Regulatory Commission*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc). Thus, we approach the question of the agency's construction of section 312(a)(7) with significant "judicial deference," *CBS*, 453 U.S. at 390, and we must uphold that construction if it is a "reasonable" one. *Chevron*, 467 U.S. at 844. We now examine whether the "Commis-

sion's action represents a reasoned attempt to effectuate the statute's access requirement." *CBS*, 453 U.S. at 390.

Petitioners argue that section 312(a)(7), as interpreted by the Commission and the Supreme Court, "prohibit[s] . . . blanket bans on candidate advertising and require[s] broadcasters to accommodate the reasonable needs of candidates." Brief for TRAC/MAP at 49. These standards, they contend, foreclose the Commission's adopting a general rule allowing a broadcaster to bar candidates from access to teletext without running afoul of section 312(a)(7). If we agree with petitioners that the Commission's decision in the teletext docket was inconsistent with the approach previously adopted by the Commission and approved by the Supreme Court, we must reverse and remand unless the agency has supplied "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

Petitioners rely heavily upon *CBS*. The Supreme Court in *CBS* reviewed the FCC's construction of section 312(a)(7) in connection with a determination that the television networks had failed to give President Carter reasonable access in order to announce his bid for reelection. In upholding the Commission's finding of a violation, the Court also upheld the individualized, case-by-case approach that the Commission had adopted in enforcing section 312(a)(7), *see, e.g.*, *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C.2d 1079 (1978) (*"1978 Policy Statement"*). The Court described the Commission's policy as follows:

> [Section 312(a)(7)] requests must be considered on an individualized basis, and broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated pur-

> poses in seeking air time. . . . If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance. But if broadcasters adopt "across-the-board policies" and do not attempt to respond to the individualized situation of a particular candidate, the Commission is not compelled to sustain their denial of access.

CBS, 453 U.S. at 387-88 (citations omitted). The Court approved the rationality of the Commission's standards proscribing the use of "blanket rules" to govern access and requiring that "each request . . . be examined on its own merits." *See id.* at 389. Acknowledging that "the adoption of uniform policies might well prove more convenient for broadcasters," the Court nonetheless accepted the Commission's view that "such an approach would allow personal campaign strategies and exigencies of the political process to be ignored." *Id.* Because "§ 312(a)(7) assures a right of reasonable access to *individual* candidates for federal elective office, and the Commission's requirement that their requests be considered on an *individualized* basis is consistent with that guarantee," the Court upheld the Commission's approach. *Id.* (emphasis in original).

Contrary to petitioners' assertions, there is, we believe, no conflict between the Commission's section 312(a)(7) policy, as approved by the Supreme Court in *CBS*, and the decision made in the teletext docket. When the Supreme Court approved the Commission's policy of proscribing "blanket rules" or "uniform policies" concerning access, this meant only that broadcasters could not adopt policies that would effectively nullify the statute's rule of reason approach to granting access to federal candidates. This does not, and could not, suggest, however, that no rules may be applied in the determination of what access is reasonable under the statute. Reasonableness does not mean that an impressionistic judgment

must be made in every case.[6] It would be impossible to follow a consistent policy with respect to reasonableness without framing some rules to guide the decisions in particular cases. A rule of reason, as the course of antitrust law shows, implies a middle range of cases which require the individualized judgment and a nice balancing of competing factors. Within a rule of reason, however, there are also cases at the extremities of the spectrum where reasonableness or unreasonableness is clear. Thus, there are areas of per se legality and illegality within any rule of reason. In the context of section 312(a)(7), Congress has empowered the Commission to establish rules and regulations to guide broadcasters in their determination of what access is reasonable, *see CBS*, 453 U.S. at 386 (citing 47 U.S.C. § 303(r)), and, while the Commission has principally developed standards on a case-by-case basis, it has also identified some of the extreme cases in which the reasonableness or unreasonableness of a practice is clear.

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[6] The Commission has historically resorted to explicitly enunciated general principles in administering § 312(a)(7). The general principles have in some instances provided only factors to consider in determining reasonableness, such as "the amount of time previously sold to a candidate, the disruptive impact on regular programming, and the likelihood of requests for equal time by rival candidates under the equal opportunities provision of section 315(a)." *See CBS*, 453 U.S. at 387. Other principles utilized by the Commission have taken the form of presumptions, for example, that "[n]oncommercial educational stations generally need not provide Federal candidates with lengths of program time which are not a normal component of the station's broadcast day" or that "[l]icensees must provide prime-time program time absent unusual circumstances . . . as part of their 'reasonable access' requirements." *1978 Policy Statement*, 68 F.C.C.2d at 1094. The Commission has also applied absolute decisional criteria, such as the unqualified rule that "[c]ommercial stations must make prime-time spot announcements available to Federal candidates." *See* The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2289 (1978).

The Court in fact approved the use of per se rules by assenting to the Commission's policy limiting the applicability of section 312(a)(7) to the period after a campaign commences, a limitation nowhere found in the statute. In this respect, the Court explained: "By confining the applicability of the statute to the period after the campaign begins, the Commission has limited its impact on broadcasters and given substance to its command of *reasonable* access." *CBS*, 453 U.S. at 388 (emphasis in original). This amounts to a rule of per se reasonableness: refusing access to a qualified federal candidate before the beginning of a campaign will never be held unreasonable under section 312(a)(7). Thus, when the Court stated that "the Commission's standards proscribe blanket rules concerning access," *see* 453 U.S. at 389, it was necessarily referring to rules whose effect would be to eliminate the case-by-case approach in the vast middle ground where reasonableness or unreasonableness is not clear. It did not mean that the Commission had foreclosed itself from adopting any rules defining the clear cases under the statute. In the teletext decision, that is all the Commission did; it merely adopted a rule of per se reasonableness as to a minor portion of the station's operations because it believed the reasonableness of that exclusion to be clear.

The acceptability of this approach is also shown by the Commission's treatment of subscription television ("STV") under section 312(a)(7) in its *1978 Policy Statement*, 68 F.C.C.2d at 1093. In that decision, the Commission accepted the argument that an STV station should not have to provide access for political broadcasting during the prime time hours that it is broadcasting because that would destroy one of the major incentives for such a service, "uninterrupted entertainment programming." *Id.* The Commission reasoned that

> [t]he purpose of giving to Federal candidates the right to prime time spots and programming is based

> upon the fact that prime time generally is the period of maximum audience potential. Since subscription television programming is generally geared to selective audiences it would appear that those stations engaged in STV have their maximum audience potential outside of normal prime time viewing periods. Therefore, we do not believe that reasonable access requires STV stations to make available to Federal candidates those periods of time in which they are engaged in STV programming.

Id. The Commission's reasoning clearly supports the general principle that the Commission can permit licensees to block out periods of time in which it would not be unreasonable to deny all access. Moreover, it appears that limited audience potential in the period of time foreclosed and the interest of preserving the vitality of the service are permissible factors in the determination of such general rules. Thus, in light of the Commission's approach to section 312(a)(7) in general and its holding in the STV decision in particular, we find that the general approach taken in the teletext docket is consistent with existing Commission precedent and the case-by-case approach utilized under section 312(a)(7).

Nor do we think that the Supreme Court's approving description of Commission policy "requir[ing] [broadcasters] to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purpose in seeking air time," *CBS*, 453 U.S. at 387, detracts from our conclusion. Petitioners argue that permitting licensees to refuse access to teletext allows broadcasters to ignore a candidate's desire both to provide "the public with detailed campaign information" and to discuss a complex set of campaign issues, and that this relieves the broadcaster of the need for the individualized tailoring of his or her response to the candidate's request. Brief for TRAC/MAP at 51. Implicit in the Commission's decision that a broadcaster need not provide access to teletext, however, is the conclusion that such pur-

poses as discussion of complex issues may be satisfied by resort to the main channel. We cannot say that the Commission's conclusion is irrational. Complex campaign issues have been treated for years in television broadcasting, well before teletext, and we do not see, nor have petitioners directed us to, any evidence that carries the petitioners' burden of showing that main channel access cannot be tailored to satisfy, as much as reasonably possible, a candidate's desire for air time for such purposes. Accordingly, we affirm the Commission's decision with respect to section 312(a)(7).[7]

IV.

Section 315 of the Communications Act of 1934 imposes two substantive obligations upon broadcast licensees. Section 315(a) requires a licensee to provide "equal

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[7] Petitioners offer an additional ground for challenging the Commission's decision regarding § 312(a)(7) and teletext. They claim that the decision "directly contradicts" Commission precedent holding that "[l]icensees may not adopt a policy that flatly bans Federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers." The Law of Political Broadcasting and Cablecasting, 69 F.C.C.2d 2209, 2289 (1978). *See* Brief for TRAC/MAP at 50. We do not reach the question whether the teletext decision conflicts with this established Commission policy, for no one raised this argument before the agency and the Commission, therefore, had no opportunity to pass on it. Section 405 of the Communications Act has codified the requirement of exhaustion of administrative remedies, *see* 47 U.S.C. § 405 (1982), and this court has construed section 405 "to require complainants, before coming to court, to give the FCC a 'fair opportunity' to pass on a legal or factual argument." Washington Association for Television and Children v. FCC, 712 F.2d 677, 681 (D.C. Cir. 1983) (citing Alianza Federal de Mercedes v. FCC, 539 F.2d 832, 837 (D.C. Cir. 1976)); *see also* Neckritz v. FCC, 502 F.2d 411, 417 (D.C. Cir. 1974). Thus, we do not consider this legal argument, which petitioners have advanced on appeal, but which no one presented to the Commission.

opportunities" to competing candidates. In operative part, it provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station[.]

47 U.S.C. § 315(a) (1982). Section 315(b) imposes the so-called "lowest unit rate" obligation upon licensees. That provision declares:

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—
>
> (1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of the general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time; and
>
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. § 315(b) (1982). The predicates for the application of both parts of section 315 are the same. There must be "a legally qualified candidate for a public office," "a broadcasting station," and a "use" of that station. The first of these is not at issue; the other two are dispositive.

Petitioners challenge the decision that section 315 does not apply to teletext on the ground that "[t]he Commission's ruling is clearly at odds with the statute." Brief for TRAC/MAP at 40. Congress has explicitly charged the FCC with "prescrib[ing] appropriate rules and regulations to carry out the provisions of . . . section [315]." 47 U.S.C. § 315(d) (1982). "Accordingly, [the agency's]

construction of the statute is entitled to judicial deference 'unless there are compelling reasons that it is wrong.'" *CBS*, 453 U.S. at 390 (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)). Even applying the considerable deference we owe the agency, however, we are unable to conclude that the agency's construction of the statute is a rational one, for it is plainly at odds with the language and intent of the statute. *See CBS*, 453 U.S. at 390. We believe that the agency erred in concluding that teletext does not constitute "traditional broadcast services" within the contemplation of the statute and that teletext is incapable of a "use" as that statutory term has evolved.

In section 153(o) of the Communications Act of 1934, Congress defined the term "broadcasting" to mean "dissemination of radio communications intended to be received by the public." 47 U.S.C. § 153(o) (1982). The Commission appears to have suggested that teletext transmissions are neither "radio communications" nor "intended to be received by the public." First, the Commission argued that the print nature of teletext differentiates it from more traditional types of electromagnetic transmissions, and that Congress, therefore, could not have intended to cover such a service under section 315. Second, the Commission distinguished teletext from "traditional broadcasting" in that teletext is an "ancillary" service. We address these points in turn.

The Commission's attempt to distinguish teletext from traditional broadcasting because of teletext's textual and graphic nature conflicts with the plain intent of Congress. The proper starting place for statutory interpretation is with "the language employed by Congress." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). On this question it is also the terminal point, for the definition of "radio communication" unmistakably includes such transmissions as teletext. In section 153(b) of the Act, Congress defined "radio communication" as

> the transmission by radio of *writing, signs, signals, pictures,* and sounds *of all kinds,* including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

47 U.S.C. § 153(b) (1982) (emphasis added). The text could hardly be clearer. Teletext falls squarely within this definition. Teletext involves "print and textual transmission" and that is plainly covered.

The Commission's attempt to distinguish teletext from the "traditional broadcast mode of mass communication" by calling it an "ancillary" service, *see Memorandum Opinion and Order*, 101 F.C.C.2d at 833, departs without explanation from well-established precedent. Teletext and main channel broadcasting are merely different time intervals within the broadcast spectrum. Teletext is "ancillary" to main channel broadcasting only in the sense that it will probably not attract nearly as many viewers. But the Commission has explicitly held that the "number of actual or potential viewers is not significant" in determining whether something constitutes "broadcasting." *See Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service, Fourth Report and Order*, 10 Rad. Reg. 2d (P & F) 1625, 1628 (1967). What matters is "an intent for *public* distribution." *Functional Music, Inc.* v. *FCC*, 274 F.2d 543, 548 (D.C. Cir. 1958) (emphasis in original), *cert. denied*, 361 U.S. 813 (1959). Under the *Functional Music* test, recently reaffirmed by this court in *National Association of Broadcasters* v. *FCC*, 740 F.2d 1190, 1201 (D.C. Cir. 1984), an intent for public distribution exists when the licensee's "programming can be, and is, of interest to the *general* . . . audience." 274 F.2d at 548 (emphasis original). The Commission has made no attempt to distinguish or repudiate this test, and no one disputes that teletext can and does carry programming, including news, sports,

weather, and information about community events, of interest to a general audience. Given our conclusion about "radio communication," it is obvious that teletext service meets the statutory definition of "broadcasting" and that the Commission therefore erred in deciding that obligations applicable to "broadcasting stations" do not apply to teletext.

We reach a similar conclusion with respect to the Commission's efforts to establish as a matter of law that a candidate cannot "use" teletext within the meaning of section 315. In a careful analysis of the legislative history, Judge Maris concluded that Congress clearly intended section 315 to apply "only to the personal use of [transmission] facilities by the candidates themselves." *Felix* v. *Westinghouse Radio Stations, Inc.*, 186 F.2d 1, 5 (3d Cir. 1950), *cert. denied*, 341 U.S. 909 (1951). The Commission has accordingly defined a "use" as follows:

> In the case of *spots*, if a candidate makes any appearance in which he is identified or identifiable by voice or picture, even if it is only to identify sponsorship of the spot, the whole announcement will be considered a use. In the case of a *program*, the entire program is a use if "the candidate's personal appearance(s) is substantial in length, integrally involved in the program, and indeed the focus of the program, and where the program is under the control and direction of the candidate."

1978 Political Broadcasting Primer, 69 F.C.C.2d at 2245 (emphasis in original). If, as the Commission urges in support of its conclusion that teletext is exempt from section 315, the teletext services were utterly incapable of a "use" thus defined, we might still doubt the rationality of a conclusion that one could not "use" teletext under section 315. Defining a "use" as a personal appearance by "voice or picture" suggests an approach under which the Commission defines "use" according to the qualities of the medium being used. In the case of traditional

broadcasting, that "use" took on an audio-visual character consistent with that of the medium. Given the textual nature of teletext, it appears to be an unexplained departure from the Commission's past practice for it not to redefine "use" to account for the nature of the new medium. Such a redefinition would allow for "use" of teletext broadcasting when there was transmission of personal statements, reprints of speeches, policy papers by the candidate, and the like. These represent clear examples of a candidate's making personal use of the teletext broadcasting medium and appear to fall within the meaning of section 315. At a minimum, the Commission would have to address whether the existence of personal "textual uses" of teletext might necessarily follow from the Commission's previous treatment of "uses" and then either redefine "use" to include such a situation or explain why it feels it can reasonably refuse to do so under the statutory scheme.

We also have a more particular objection to the Commission's reasoning. The Commission asserted that a "use" was not possible because teletext could not reproduce a "voice or picture" of a candidate. In this, the Commission ignored the fact that teletext is capable of high-resolution graphics and can transmit a recognizable image of a candidate using that capability. The transmission of a "drawing or other pictorial representation" of a candidate, if "identified or identifiable," will satisfy "the requirement for an appearance by voice or picture of a candidate." *Carter/Mondale Reelection Committee, Inc.*, 80 F.C.C.2d 285, 286 (Broadcast Bureau 1980). Thus, even under the current definition, teletext cannot be found utterly incapable of a "use" under section 315. Because the Commission did not acknowledge or in any way deal with this inconsistent precedent, its ruling cannot be deemed the product of reasoned decisionmaking.

Accordingly, we reverse the Commission's decision with respect to section 315 and remand for further proceed-

ings consistent with this opinion. We now turn to an examination of the Commission's treatment of the fairness doctrine.

V.

The fairness doctrine "provides that broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 C.F.R. § 73.1910 (1985). The doctrine arose "under the Commission's power to issue regulations consistent with the 'public interest,' . . . [and] imposes two affirmative obligations on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 110-11 (1973). The basic purpose of the fairness doctrine is to ensure that the American public not be left uninformed. *Green* v. *FCC*, 447 F.2d 323, 329 (D.C. Cir. 1971). In serving this interest, the Commission has emphasized that "the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith." *Fairness Report*, 48 F.C.C.2d 1, 9 (1974).

In practice, this means that the Commission exercises very limited review of the first part of the doctrine, the obligation to devote an adequate amount of time to the discussion of public issues. Decisions about the quantity of time to devote and the issues selected rest with the licensee. The Commission, in reviewing whether the licensee has provided an adequate amount of public interest programming, limits the inquiry to a "determination of [the] reasonableness" of the sum of the time provided. *Fairness Report*, 48 F.C.C.2d at 10. With respect to the choice of issues covered, the Commission has, in the past,

> indicated that some issues are so critical or of such great public importance that it would be unreason-

> able for a licensee to ignore them completely. But such statements on [the Commission's] part are the rare exception, not the rule, and [the Commission does not] . . . becom[e] involved in the selection of issues to be discussed, nor . . . [does it] expect a broadcaster to cover each and every issue which may arise in his community.

Id. (citation omitted).

With respect to the second part of the fairness doctrine obligation, the duty to provide reasonable coverage to discussion of opposing viewpoints, the Commission has also attempted to preserve licensee discretion. In its 1974 *Fairness Report*, the Commission summarized its position as follows:

> When a licensee presents one side of a controversial issue, he is not required to provide a forum for opposing views on that same program or series of programs. He is simply expected to make a provision for the opposing views in his *overall programming*. Further, there is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesman and format for their presentation are left to the licensee's good discretion subject only to a standard of reasonableness and good faith.

48 F.C.C.2d at 8 (emphasis in original). The reasonableness of the balance depends on a variety of factors, including such considerations as the amount of time afforded each side, the frequency of presentation of each side's position, and the size of the audiences of such presentations. *Id.* at 17.

The FCC in the teletext docket decided to exempt that service entirely from the requirements of the fairness doctrine. The Commission premised its decision on the fact that Congress never actually codified the Commission's fairness doctrine, and that the Commission, there-

fore, had no obligation to extend its own policy to new services like teletext. Petitioners dispute this interpretation, arguing that the fairness doctrine "is a statutory obligation that requires *all* broadcasting services to provide reasonable opportunities for the presentation of contrasting viewpoints on controversial matters of public importance." Brief for TRAC/MAP at 34-35 (emphasis in original). Because teletext constitutes broadcasting under the terms of the statute, petitioners argue that the fairness doctrine must be applied. *Id.* at 37.

We begin our analysis by reciting the classic formulation of the fairness doctrine:

> The Commission has . . . recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.

Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949). Thus, the fairness doctrine imposes obligations on "licensees" in the use of their "broadcast time." Teletext is broadcast time operated by Commission licensees or by lessees under the control of licensees. We find it clear, therefore, that the fairness doctrine by its terms applies to teletext; no extension is necessary. Indeed, it appears an affirmative departure from precedent for the Commission to say that a licensee's fairness obligations apply only to a part of its broadcast time. Thus, we must examine whether the doctrine amounts to a statutory obligation preclusive of the Commission's making such a departure, and, if not, whether the Commission adequately explained its change in policy.

The dispute about whether the fairness doctrine is a statutory obligation or a Commission policy centers around a 1959 amendment to section 315 of the Communications Act of 1934. Congress amended section 315(a) explicitly to exclude from the definition of "use of a broadcasting station" such programming as bona fide newscasts, bona fide news interviews, bona fide news documentaries, and on-the-spot coverage of bona fide news events. *See* Pub. L. No. 86-274, 73 Stat. 557 (1959). Alongside the insertion of this change in the statute, Congress also added the following language to section 315(a):

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed on them under this Act to operate in the public interest and to afford reasonable opportunity for the presentation of conflicting views on issues of public importance.

47 U.S.C. § 315(a) (1982). *See also* Pub. L. No. 86-274, 73 Stat. 557 (1959). Petitioners suggest that we must treat this passage as a codification of the fairness doctrine as applied at the time of the 1959 amendment and that the Commission, therefore, may not alter the fairness obligation, even if it believes such a change to be required in the public interest. We disagree.

We do not believe that language adopted in 1959 made the fairness doctrine a binding statutory obligation; rather, it ratified the Commission's longstanding position that the public interest standard authorizes the fairness doctrine. The language, by its plain import, neither creates nor imposes any obligation, but seeks to make it clear that the statutory amendment does not affect the fairness doctrine obligation as the Commission had previously applied it. The words employed by Congress also

demonstrate that the obligation recognized and preserved was an administrative construction, not a binding statutory directive. Congress described the obligation to which it addressed its admonition as one "imposed . . . *under the Act*," 47 U.S.C. § 315(a) (1982) (emphasis added), not *by* the Act. This suggests that Congress viewed the doctrine as an obligation promulgated pursuant to authority conferred under the Act, specifically, the public interest mandate, and not as a fixed requirement frozen in place by the Act. Thus, by its 1959 amendment, "Congress . . . expressly accepted . . . that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations." *Red Lion*, 395 U.S. at 382. "In other words, the amendment vindicated the FCC's general view that the Fairness Doctrine inhered in the public interest standard." *Id.* at 380.

Because the fairness doctrine derives from the mandate to serve the public interest, the Commission is not bound to adhere to a view of the fairness doctrine that covers teletext. "An agency's view of what is in the public interest may change, either with or without a change in circumstances." *Greater Boston Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (footnote omitted), *cert. denied*, 403 U.S. 923 (1971). To the extent that the Commission's exemption of teletext amounts to a change in its view of what the public interest requires, however, the Commission has an obligation to acknowledge and justify that change in order to satisfy the demands of reasoned decisionmaking. *See id.*; *see also International Union, United Automobile, Aerospace and Agricultural Implement Workers of America* v. *NLRB*, 459 F.2d 1329, 1341 (D.C. Cir. 1972) ("It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them.").

The Commission has offered two justifications for its refusal to apply the fairness doctrine to teletext. First, the Commission relies on its theory about the textual nature of teletext and the first amendment implications flowing from this distinction between teletext and other, more traditional modes of broadcasting. As we have already discussed, *see supra* pp. 10-18, however, the Supreme Court has drawn a different line so that the Commission can gain no constitutional support for the disparity in regulation between teletext and traditional broadcasting.

The second justification is more substantial. The Commission decided, and petitioners have not disputed, that the burdens of applying the fairness doctrine might well impede the development of the new technology and that "the likelihood of licensees' embarking upon . . . endeavors [like teletext] will be substantially affected" by the agency's policy. *Report and Order*, 53 Rad. Reg. 2d (P & F) at 1324. Accordingly, the Commission explicitly concluded that "the public interest is better served by not subjecting teletext to Fairness Doctrine obligations." *Id.*

We believe the Commission acted rationally in so concluding. Petitioners have not challenged the Commission's assertions about the negative impact the application of the fairness doctrine would have upon the development of teletext. Moreover, the Commission's view that encouragement of new technologies serves the public interest is not only rational, but is explicit in the Communications Act of 1934. *See* 47 U.S.C. § 303(g) (1982). In effect, the Commission posited an absence of fairness doctrine burdens and made predictions about the marginal encouragement to the development of teletext and the marginal diminution, if any, in the presentation of opposing viewpoints on controversial matters of public importance. In weighing the public interest implications of the two marginal effects, the Commission concluded that the balance favored forbearance from applying the

fairness doctrine, and, absent a showing, not even attempted here, that this conclusion was arbitrary and capricious, we cannot disturb the Commission's decision on this point. Accordingly, with respect to the fairness doctrine, we affirm the decision of the Commission.

To summarize: we reverse and remand the Commission's decision for further proceedings consistent with this opinion as it concerns section 315 of the Communications Act of 1934, and we affirm the Commission's decision with respect to section 312(a)(7) and the fairness doctrine.

It is so ordered.

MACKINNON, *Senior Circuit Judge* (concurring in part and dissenting in part). I concur in parts II and IV of Judge Bork's opinion but dissent with respect to parts III and V. I would thus allow reasonable access to teletext by legally qualified candidates for federal elected office on behalf of their candidacies. I would also hold that the fairness doctrine is applicable. This would require teletext operators to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. In my opinion this would not impede the development of teletext.

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations.	BC Docket No. 81-741 RM-3727 RM-3876

REPORT AND ORDER

(Proceeding Terminated)

Adopted: March 31, 1983 ;Released: May 20, 1983

By the Commission: Commissioner Quello issuing a separate statement; Commissioner Jones concurring and issuing a statement; Commissioner Rivera dissenting in part and issuing a statement in which Commissioner Fogarty joins; Commissioner Sharp concurring and issuing a statement.

Introduction

1. On October 22, 1981, the Commission adopted a *Notice of Proposed Rule Making,* 46 Fed. Reg. 60851 (published December 14, 1981) to consider authorizing television stations to engage in teletext service. Teletext is a new form of radio communication that involves the transmission of textual and graphic data on the vertical blanking interval (VBI) of the video portion of the television signal.[1] The *Notice* was issued to study authorization of this new media form as a result of the considerable interest in teletext service and technology that has developed in the

[1] The vertical blanking interval is that portion of the television signal that appears as a black bar when the picture rolls.

several component industries associated with television broadcasting.[2] In addition, the *Notice* was issued in response to separate petitions from CBS, Inc. (RM-3727) and the United Kingdom Teletext Industry Group (RM-3876) that requested the adoption of rules to authorize teletext.

2. We conclude that the overall record in this proceeding supports our initial assessment that authorization of teletext would serve the public interest. The specific rules being adopted are consistent with the proposals in the *Notice* and are discussed in detail below.[3]

Responses To That Notice

3. Forty-nine formal comments and twenty-seven reply comments were submitted by fifty-six parties in response to the *Notice.*[4] Four other major submissions in the form of reports and informal comments also were received. The comments and reports submitted essentially addressed issues and questions presented in the *Notice.* In addition, a large number of informal comments were received from hearing-impaired citizens and from groups representing the

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[2] Examples of teletext service include news, weather reports, comparative shopping prices, entertainment schedules, closed captions for the hearing impaired, and business oriented information.

[3] A petition for reconsideration of Commission action taken in the *Notice* was filed by CBS requesting the selection of a single technical system. That petition is being denied for the reasons set forth *infra* under the heading *Authorization of Transmission Systems.*

[4] Time, Inc. which filed regular comments in this proceeding, has asked for leave to file a late reply to a letter dated March 8, 1982, to the Chairman of the Commission signed by 26 members of the U.S. Senate. In view of the short time period remaining for filing replies when this letter became available and in the interest of developing a full record in this proceeding, Time's reply to the subject letter has been accepted. Also, on July 9, 1982 the PLEAD Committee asked the Commission to accept late filed comments. Because PLEAD's request was made late in the process of our deliberations and did not raise any new significant points or issues, its request is being denied.

hearing-impaired concerning the relationship between teletext and the line 21 closed caption service. The only major new issue that was raised in the comments concerns the regulatory treatment of point-to-point and point-to-multipoint teletext services. A list of those filing formal comments, replies and major reports is contained in Appendix A.

4. *Authorization of Teletext Service*—The respondents who addressed the fundamental question of whether to permit stations to transmit teletext were unanimous in their support for authorizing the service. These parties generally cited the wide variety of applications and uses mentioned in the *Notice* as reasons why teletext would serve the public interest and thus should be authorized.

5. Commenters favoring teletext authorization were also unanimous in their support for the proposal to create a regulatory environment that would allow licensees to exercise their own judgment and discretion with respect to the kinds and levels of service to provide. The expressed consensus was that market forces would provide the best means for determining the mix of services that would most effectively meet the needs and interests of teletext users.

6. The proposal to regulate teletext under an open environment policy as described in the *Notice* was based in part on the proposal to treat teletext as an ancillary service. As such, teletext activities would not be a primary service of television stations. Licensees would continue to fulfill their public trust obligations through their regular programming. Thus, teletext operations would not be subject to service guidelines or other performance standards. All of the commenters who responded to this proposal agreed that teletext should be treated as an ancillary service. Some respondents also requested that the meaning of ancillary treatment be more fully described, while others expressed the view that it was necessary to develop a legal rationale for exempting teletext from certain statu-

tory performance requirements such as the political broadcasting rules and the Fairness Doctrine contained in Sections 312(a)(7) and 315 of the Communications Act. In reply comments, several parties also recommended that stations not be required to submit notice to the Commission prior to initiating or terminating service.

7. The american Newspaper Publishers' Association (ANPA) stated that it was particularly interested in seeing that teletext be allowed to develop as an ancillary service that would be free from the service guidelines and performance standards of regular television service. It stated that the unique nature of this medium requires the absence of government mandated programming judgments. It also stated that there is no basis for applying affirmative programming obligations to teletext because it is an adjunct service that does not interfere with regular program service. The Videotex Industry Association (VIA) stated that it favors not applying the Fairness Doctrine and equal time regulations to teletext.

8. The National Association of Broadcasting (NAB) asked that the proposal to regulate teletext as an ancillary service be clarified. While it applauded the concept of affording maximum freedom to licensees in their provision of teletext service, the NAB urged the Commission to explain how such treatment could be accommodated under the Communications Act. This view also was expressed by the American Broadcasting Company. The VIA recommended that ancillary treatment be interpreted to mean that: (1) stations may engage in teletext without prior authorization from, or notification, to, the commission; (2) stations may operate on a subscription or advertising basis at their own discretion; (3) addressable teletext is permitted; and (4) subscribers may purchase teletext decoders.

9. In the *Notice,* the Commission proposed to define teletext as a data system for transmission of textual and graphic information intended for display on viewing

screens. This definition was intended to make teletext available for a wide range of applications while at the same time limiting the service under consideration to teletext. Comments were requested as to whether this teletext definition should be expanded to include data transmissions not necessarily intended for visual display. A number of the commenting parties expressed a preference for expanding the teletext definition to incorporate the transmission of data not specifically related to the display function. Specifically, Community Telecasters of Southern California proposed that the definition of teletext be broadened to allow the transmission of control functions and the distribution of computer software. It stated that expanding the definition would stimulate the development of the widest range of teletext applications. Time, Inc. suggested that the proposed definition be amended to include reference to the delivery of data that is received by the home terminal and either played by it as an aural signal or delivered in hard copy form by a printer. Time, Inc. also stated that the definition should provide that the data stream can include computer software that contains instructions to the receiving equipment to enable it to process, display, or play the data. ABC submitted that the definition should be broadened to allow the use of printers in the home for hard copy printed data, bulletins, and coupons. Statements and positions similar to these were also offered by the United Kingdom Teletext Industry Group, and the Corporation for Public Broadcasting.

10. Springfield Television Corporation submitted that the proposed definition was too restrictive and as an alternative suggested a broad and simple statement such as "a service for the provision of data to the general public or substantial segments thereof." The view that teletext should encompass a broad authorization was shared by Satellite Television Systems, Inc., and Antiope and Telematics Corporation.

11. The Commission also proposed that stations be permitted to engage in consumer subscription and business services as well as traditional advertiser supported services that may or may not be related to regular television program fare. Responses to this proposal were favorable. In fact, a number of respondents offered suggestions further to generalize this open approach to other service options. For example, the Videotex Industry Association recommended that both single franchise operators and multiple or time-sharing arrangements be permitted. With regard to franchise leasing, the American Newspaper Publisher's Association stated that participation by third parties would be an important economic factor in the growth of teletext. It submitted that the most substantial costs associated with teletext are those involving developing, maintaining, packaging, financing, and marketing a current and appealing data base. The ANPA contended that the broadcaster may be unwilling or unable to underwrite these costs, and that a broadcaster's freedom to lease its teletext service to other information providers is therefore necessary to facilitate the maximum growth of teletext service.

12. Several parties also raised questions concerning the regulatory status of teletext with respect to common carrier considerations. These issues were not specifically discussed in the *Notice.* The Videotex Industry Association urged the Commission to adopt a policy: (1) that teletext services offered by a broadcaster in general, and broadcaster franchising and/or time-sharing practices in particular, would not be considered a common carrier service; (2) that providers could charge whatever they desired for the use of teletext; and (3) that they would not have to provide access on a first-come, first-served basis. Similar opinions on these issues were expressed by Golden West Broadcasters, Cox Broadcasting, and the NBC Television Network Affiliates. The american Society of Travel Agents took the opposite view on the access issue. It stated that the Commission should not allow the discriminatory access

and rate practices that would be permitted under the proposed policy.

13. Another issue discussed by the commenters is whether public, noncommercial stations should be permitted to engage in for-profit teletext activities. The National Association of Public Television Stations stated that public television stations should have the same authority as all other television stations with respect to both content and terms of service. The University of wisconsin also supported this position. It asked that public broadcast licensees be permitted to engage in the same advertiser supported, consumer subscription, and business services that were proposed for commercial stations. No commenter opposed such authorizations for public broadcast stations.

14. *Authorization of Transmission Systems*—One issue that received substantial attention and interest in the comments was the proposal to allow each station to use the transmission system of its choice for teletext operation. The only restriction proposed was that teletext signals could not interfere with the regular service of the originating station, the service of other television stations, or station in any other "legitimate" radio service. The responses on this subject were divided with fifteen parties in favor of allowing decisions concerning the selection of a system to be made in the market, and fourteen in favor of the Commission selecting a single system.[5] The two

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[5] The open market advocates were: Zenith Radio Corporation, Koplar Communications, Inc., United Kingdom Teletext Industry Group, Subscription Television Association, American Newspaper Publishers Association, the University of Wisconsin, Bonneville International Corp., RBC Communications, American Society of Travel Agents, Association of Maximum Service Telecasters, Inc., Field Communications Corp., Satellite Television Corp., NBC Television Network Affiliates, and Springfield Television Corp. The single system proponents were: Time, Inc., Times-Mirror Videotex Services, Inc., National Association of Public Television Stations, Telidon Videotex Systems, Inc., WGBH Educational Foundation, National Association of Broadcasters, PBS, Tribune

equipment manufacturers who submitted comments were also split on this issue. Zenith supported the open market approach and stated that it would design and build teletext receivers in response to market demand. However, RCA favored a single standard and stated that the "one-system" approach would protect the consumer from the excessive cost of a decoder capable of handling multiple systems. Generally, commenters who preferred the British System supported the market approach while backers of the Antiope, Telidon, and North American Broadcast Teletext Specification tended to favor the single system plan.

15. Respondents supporting the open market proposal generally agreed with the statements in the *Notice* concerning the advantage of relying on market forces to direct the development of teletext in the technical area. For example, RBC communications believed the forces of competition can effectively regulate the level and nature of teletext services in a particular market. It contended that government establishment of inflexible regulatory standards with respect to permissible services would only frustrate the ability to satisfy consumer needs through the marketplace. In a similar statement, Field Communications asserted that the economic forces of the marketplace are well equipped to balance and weigh the subtle economic and technical trade-offs between competing systems required in any system selection process. The NBC Television Network Affiliates submitted that an open market approach to the development of teletext would allow service providers, primarily local television broadcasters, to apply the necessary discretion and expertise to utilize a service best suited to their needs and those of the public they serve. The Satellite Television Corporation also was concerned that teletext might be frozen at its current stage of development if a single system were to be adopted.

Company Broadcasting, Inc., ABC, NBC, CBS, Marshall Wick, Antiope and Telematics Corporation, and Community Telecasters of Southern California.

16. Another factor cited by several parties parties as a reason for supporting the open market proposal is the delay in initiation of service that would attend a proceeding to set standards. Zenith stated that while it believes a technical standard usually is desirable for major broadcast services, a number of considerations in the teletext area reduce the likelihood of establishing a single system standard at the outset. It stated that it would take a number of years to resolve pertinent issues and to conduct an associated rule making proceeding. Koplar Communications, the United Kingdom teletext Industry Group, and others took similar positions. They also pointed out that a delay in authorization could result in very real competitive harm to broadcasters because cable and telephone systems are now implementing, or have plans to implement, teletext and videotex services in the open market, uninhibited by any regulatory proceeding or mandated standards.

17. The single system proponents supported the points brought out in comments on the two petitions for rule making filed by CBS and the United Kingdom teletext Industry Group prior to issuance of the *Notice*. CBS, the most vigorous proponent of a single system, stated in its petition for reconsideration that, without a single system standard, teletext development would be slowed to such an extent that its ability to exist in a form that will serve the public in a useful manner would be impaired. It asserted that without such a standard: (1) receiver manufacturers would be hesitant to manufacture receivers containing teletext decoders; and (2) television stations would be reluctant to invest in teletext equipment and to commit resources to initiating and sustaining a teletext service. It also asserted that users would be unwilling to purchase several decoders to view the teletext transmissions of all broadcasters in a single market. Moreover, CBS claimed that a single system standard would hasten and intensify competition among licensees and networks willing

to provide teletext service and would eliminate the unnecessary waste of resources caused by obsolesence. CBS stated that the Commission should adopt the North American Broadcast Teletext Specification as the standard for the United States. Positions similar to that of CBS also were presented by the Community Telecasters of Southern California, the National Association of Public Television Stations, Telidon Videotex System, Inc., and others. The NAB supported the adoption of a single system but did not take a position on which one should be chosen.

18. In reply comments, PBS responded to Satellite Television Corporation's concern that a standard system might freeze technology at its current level of development. Specifically, PBS suggested that there be a special provision in the rules to allow teletext operation using other systems upon application to the Commission.

19. The WGBH Educational Foundation was concerned about teletext service for the hearing-impaired. It stated that adoption of a teletext standard would be a step toward resolving present uncertainties in the deaf community and the closed captioning industry as to the future of the line 21 system. WGBH submitted that the disappointing sales of line 21 decoders have given rise to concern that the line 21 system may not be viable. It argued that, if closed captioning is to continue to be viable, it must be incorporated into a versatile and widely available standard teletext service.

20. *VBI Lines for Teletext Use*—The technical rules proposed in the *Notice* included authorization for specific lines in the VBI and interference-related technical parameters. The intent of these specifications was to define the segments of the VBI where teletext could be transmitted and to ensure that teletext would not produce interference to other radio communications services.

21. The Commission proposed to allow teletext on lines 14-18, 20 and 21 of the VBI upon adoption of the rules

and to phase in authorization for lines 10-13 according to a pre-set schedule. It also emphasized that this proposal was merely to authorize use of these lines, and that the lines would not be reserved exclusively for teletext. Finally, it stated that this policy of non-reservation would allow new uses and services for the VBI to be considered without prejudice to the existing teletext authorization.

22. The majority of commenters supported the authorization of VBI lines as proposed. However, Springfield Television Corporation and Antiope and Telematics Corporation took issue with the plan to refrain from reserving lines for the exclusive use of teletext. Springfield was concerned that the development of teletext would be impeded unless lines are exclusively reserved for teletext. It recommended that the Commission initiate action to make line 19 (currently reserved for the Vertical Interval Reference Signals (VIRS)) available exclusively for teletext. The Cognitive Science Laboratory recommended that lines 10-13 be reserved for future technologies that could make new aural and visual service available for handicapped persons.

23. *Teletext and the Line 21 System for closed Captions*— The majority of the thirteen formal respondents who addressed the proposed authorization of teletext on Line 21 expressed concern that such action would have an adverse effect on closed caption services and asked the Commission to protect the line 21 caption system.[67] They contended

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[6] See Section 73.682(a)(22)(i) of the Commission's Rules.

[7] The parties that commented on this issue were: Antiope and Telematics Corporation, Gallaudet College, American Speech-Language-Hearing Association, Alexander Graham Bell Association for the Deaf, United Kingdom Teletext Industry Group, National Association of Public Television Stations, WGBH Educational Foundation, NAB, PBS, National Captioning Institute, ABC, NBC, and the Corporation for Public Broadcasting. In addition, on March 8, 1982, the Commission received a letter signed by 26 United States Senators urging the preservation of the line 21 caption system.

that the nonprofit caption service would be placed in direct competition with commercial, profit oriented teletext service. Under these circumstances, they stated that market forces could be expected to give insufficient, if any, consideration to the needs of the hearing-impaired. They further stated that existing telecaption decoders would become obsolete if captions were transmitted on teletext and not on the line 21 system, and that therefore the utility of the substantial investment that has been made in line 21 system equipment would be lost. Moreover, they asserted that teletext would not be able to provide service similar to that on the system now in place at any time in the foreseeable future. PBS, the National Captioning Institute, and ABC also disputed the Commission's statement in the *Notice* that it appears that teletext has the capability of providing caption services that are superior in many respects to those of the line 21 system. These respondents recommended that: (1) line 21 be reserved for the existing caption system; (2) captions transmitted on teletext be simultaneously transmitted on line 21[8]; and (3) cable systems not be permitted to delete or replace either teletext or line 21 captions. It was claimed that these measures also would allow for a gradual, non-disruptive transition to teletext-based captions in the future, if that is where technology and the market ultimately take this service.

24. On the other side of this issue, Antiope, NBC, and the WGBH Educational Foundation contended that the line 21 caption system does not appear to be viable and that teletext authorization would be a step toward resolving uncertainties in the deaf community and the captioning industry with respect to the line 21 system. All three of these parties pointed to the low volume of decoder sales as evidence of the failure of this system to achieve market

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[8] In its petition for rule making (RM-3876), the United Kingdom Teletext Industry Group submitted that it has developed a device to translate British system captions to the line 21 system.

acceptance. The relatively high price of telecaption decoders was cited as the cause of the problems. Marshall Wick, who supported the more moderate approach of reserving line 21 for captions only for the time being, submitted that the survival of closed caption service may depend on teletext, as high volume sales are expected to bring the incremental cost of a teletext equipped receiver down to the range of $25 to $50.

25. *Technical Rules for Operation*—On the subject of interference standards, the majority of those who discussed this issue stated that they believed the proposed rules were adequate, but did not offer any technical elaboration or evidence to support their opinion. CBS provided the most extensive discussion of interference related standards. CBS stated that the proposal that a teletext signal subject no more than one percent of the total receiver population to interference, when coupled with the KCET visibility test, is a reasonable criterion to ensure that teletext would not interfere with regular broadcast operations.[9] CBS estimated that the design costs to incorporate the retrace circuitry necessary to eliminate totally the visibility problem in future receivers would be minimal. RCA submitted that it has conducted initial tests suing simulated teletext signals and has found visible interference from signals on lines prior to line 15 at the proposed maximum IRE level. Based on these results, RCA suggested that the Commission defer any action on teletext authorization for six months to allow a more complete series of tests to be conducted.

26. CBS recommended that a single data rate be specified and that an optimal choice would be 5.7272 Mbits/sec. This would provide a high data rate without straining the teletext system. CBS also stated that the 5.7272 Mbits/

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[9] KCET Teletext Project, "The Viewer's Perception of Teletext Transmissions on lines 10-14 of the Vertical Blanking Interval," (Los Angeles), July 16, 1980.

sec. data rate would have the added advantage of bearing a specific relationship to the color subcarrier frequency. Antiope also recommended the 5.7272 Mbits/sec. rate and contended that authorization of two or more alternative data rates would complicate decoder circuitry and possibly cause degradation through mutual interference. PBS stated that it believes the Commission should set a single rate, as multiple rates would drive up decoder costs. It did not support a specific data rate but instead suggested relying on the results of studies by the EIA to determine an appropriate standard.

27. CBS recommended a pulse amplitude standard of 70 IRE units as a good compromise between a strong signal for decoder operation and interference considerations. Antiope joined in this position. PBS preferred lowering the proposed standard from 100 to 80 IRE units. It stated that higher signal levels likely would cause audio buzz.[10]

28. On the question of pulse shaping, CBS supported the Commission's proposal that "data pulses shall be shaped to limit spectral energy to the nominal video baseband." Antiope suggested that the raised cosine 100 percent roll-off pulse shape may be ideal for teletext, but that it had no objection to the proposed rule that would permit this as well s other pulse shapes.

29. Following the suggestions of CBS and the United Kingdom Teletext Industry Group as set forth in their respective petitions for rule making, the Commission proposed to allow the use of an adaptive equalizer pulse to provide a reference signal for a device to compensate for multipath reflections. The specific proposal was to permit such pulses on any of the VBI lines authorized for teletext.

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[10] There have been some reports from the EIA studies and the field tests conducted on several stations of minor interference, mainly of an audio buzz nature, where high signal levels were used for teletext or where teletext was transmitted concurrent with line 21 captions.

In its petition for rule making, CBS mentioned including the reference signal in a portion of the vertical synchronization waveform (lines 1-9) as an alternative suggestion.

30. Four of the five parties responding to his question supported the proposal to authorize transmission of reference pulses. Community Telecasters of Southern California, Time, Inc., and Springfield Television Corporation all stated that the pulses should be transmitted in the vertical synchronizing wave form to conserve spectrum. Zenith supported authorization of these signals on lines 10-13 and stated that the pulses would be of such short duration that they would not produce noticeable interference on existing receivers. Antiope was the only party to object to this proposal. It asserted that the use of an active equalizer pulse on any of the VBI lines would foreclose use of a line that might otherwise be employed for improved spectrum use. Antiope also submitted that Philips Corp. currently has a chip in development that can equalize a signal without special pulses using the transmitted data as a reference point. Thus, Antiope stated that an additional reference pulse is not necessary to reduce multipath-induced errors.

31. In the *Notice,* the commission recognized the likelihood that equipment manufacturers would develop and market external decoders that could be attached to existing receivers to enable them to display teletext. Comments were requested as to whether such devices should be treated as a TV Interface Device, formerly Class I TV Device, under Part 15 of the Rules or as a receiver under Part 15, Subpart C.[12] In response to this issue, Zenith and

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[11] In Docket 79-244, the rules regulating a Class I TV Device were replaced with new rules that renamed this kind of equipment a "TV Interface Device," revised the technical standards and changed the equipment approval requirement from type approval to certification. The *Report and Order* in this proceeding was adopted February 9, 1983 (48 FR 13029, published March 29, 1983).

Community Telecasters of Southern California stated that to the extent that teletext decoders supply a modulated RF signal to the terminals of a television receiver, such decoders should be considered TV Interface Devices. Zenith expressed concern that external decoders might be treated as TV receivers subject to the All Channel Receiver Act and offered the opinion that such treatment would be unnecessary if teletext is authorized as an ancillary service. Time, Inc. recommended that the Commission provide for implementation of text decoders as part of multi-function devices.

32. The Commission also proposed that when teletext is used to provide a captioning service, the captioning service should give way to visual emergency messages. This requirement currently exists for line 21 captioning services in Section 73.1250 of the Rules. With the exception of Springfield Television Corporation, which objects only to the principle of such a rule, all of the respondents who addressed this issue indicated that they supported the proposed extension of this rule to teletext.

33. *Teletext and Cable Carriage Issues*—The Commission did not make any specific proposals with respect to cable carriage of teletext signals. Instead, information was requested with regard to several questions concerning the possibility of permitting cable systems to delete or replace a broadcast station's teletext signals and the technical and the technical aspects of cable retransmission of teletext.

34. Twenty-four parties submitted information and opinions on this subject.[12] The central issue discussed was

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[12] Parties responding to this subject included: Community Telecasters of Southern California, Time, Inc., Zenith Radio Corporation, Koplar Communications, Inc., National Association of Public Television Stations, University of Wisconsin, WGBH Educational Foundation, NAB, RBC Communications, PBS, Tribune Company Broadcasting, Inc., ABC, NBC, Association of Maximum Service Telecasters, Cox Broadcasting Corporation, Golden West Broadcasters, Storer Broadcasting Corpo-

whether cable systems should be required to retransmit the teletext signals of broadcast stations they carry. Nineteen respondents favored some form of mandatory retransmission requirement. However, five respondents not only opposed such a policy, they also contended that cable systems should be allowed to strip off a station's teletext signal and replace it with material from other sources. In general, those associated with the broadcast industry favored mandatory carriage, while those involved with the cable industry opposed it.

35. Supporters of mandatory carriage focused on the following points: (1) the viability of teletext requires full access to its potential audience; (2) the vertical blanking interval should remain under the control of the station licensee; and (3) cable viewers might lose access to program-related teletext such as closed captions if cable carriage were not mandatory. On the viability point, the Tribune Company Broadcasters asserted that the proportion of households subscribing to cable service is growing each year. Tribune submitted that if cable operators are permitted to delete or replace the television VBI, stations could lose a substantial portion of their potential teletext audience. Tribune also contended that given the option to carry or not carry teletext, a cable system would choose to delete it because broadcast data services would compete directly with any teletext or videotex services that the cable system offered.

36. NBC, CBS, the Association of Maximum Service Telecasters, and several others asserted that teletext should be treated as an integral part of the television signal. They also generally argued for retransmission of the teletext signals of all cable-carried television stations, regardless of whether they are provided on a "must carry" or op-

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ration, CBS, Springfield Television Corporation, NCTA, Marshall Wick, Joint Cable Systems, MultiVisions, Ltd., and the National Captioning Institute.

tional basis. Cox Broadcasting submitted that as an application of the licensee control principle, the Commission should not permit cable systems to delete or replace the signals of "must carry" stations. Cox and other parties emphasized that they considered mandatory teletext carriage especially important in the case of "must carry" stations because of the local service nature of teletext on these stations.

37. Several respondents representing the interests of the hearing-impaired were concerned that closed caption program material may be deleted if cable carriage of teletext is not made mandatory. The WGBH Educational Foundation stated that program-related teletext data should be considered an element of a station's main program service and therefore should be required carriage on cable systems. This position was echoed by the National Captioning Institute, the National Association for the Deaf, and others.

38. Finally, the NAB submitted that the *WGN* decision requires a determination, on a program-by-program basis, as to whether teletext is separable from regular programming, insofar as copyright law is concerned.[13] It stated that such determinations would be prohibitively costly. Therefore the *WGN* decision is unworkable in this context. The NAB asserted that requiring cable retransmission of all teletext signals of carried stations would remedy this problem. Cox Broadcasting stated that a rule prohibiting cable systems from deleting teletext would not be inconsistent with *WGN*. It submitted that the court expressly limited its decision to the copyright questions presented and disclaimed adjudication of WGN's equitable and property rights.

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[13] *See WGN Continental Broadcasting Co. v. United Video, Inc.*, 523 F. Supp. 403 (1981), *rev'd and remanded*, 685 F. 2d 218 (7th Cir. 1982), pet. for rehearing den'd, 693 F. 2d 628 (7th Cir. 1982).

39. Supporters of the cable industry position opposed any rules that would restrict cable systems from deleting broadcast stations' teletext and/or replacing it with material from another source. They asserted that there are sound legal, policy, practical, and technical reasons why cable carriage of teletext should not be mandatory. The legal and policy reasons were based on the premise that, as an ancillary service, teletext need not be used to address the problems, needs, and interests of society. The National Cable Television Association (NCTA) stated that, given this deregulatory environment, teletext would lack attributes that might otherwise entitle it to carriage by cable systems. In this context, NCTA submitted that the purpose of the mandatory signal carriage rules is to protect the viability of local television program service. It pointed out that carriage of other broadcast television services such as subscription television and low power stations is not required. NCTA also contended that exclusion of teletext from the mandatory signal carriage rules would not necessarily preclude delivery of teletext to cable subscribers. Instead, it would permit cable operators to exercise discretion in selecting services for subscribers. Further, several cable systems in "Joint Comments" asserted that the Commission does not have the authority to require cable systems to carry teletext if it is considered an ancillary service. They also asserted that mandatory carriage would violate cable systems' rights under both the First and Fifth Amendments to the Constitution.

40. On other matters, commenting parties on both sides of the teletext cable issue agreed that there are likely to be technical problems in retransmitting teletext through the equipment of some cable systems. Although no comprehensive research studies were available, the consensus of CBS, NCTA and several others was that the main difficulty arises in the capability of head-end processors to pass on teletext signals without degradation. NCTA stated that certain models appear to pass along teletext signals

without degradation, while others either partially degrade the signals or block them altogether. It concluded that many cable systems would need to modify or possibly even replace head-end processors to retransmit teletext. CBS, which favored mandatory carriage, asserted that relatively new systems can handle high data rates, so that the retransmission problem is limited mainly to older systems. CBS stated that modification of the head-end processors of newer systems could be accomplished at minimal cost to the cable operator.[14] CBS also stated that reflections in a cable distribution facility and interchannel interference are not likely to pose any significant problems for teletext carriage. NCTA reserved its position on these two aspects, stating that they are areas in which little testing has been done. ABC suggested that the technical problems of retransmission could be addressed by a provision in the rules to allow teletext to be deleted upon submission of a statement of technical difficulties and information that establishes that there is no other reasonable way to avoid intherference.

Discussion

41. After carefully examining the numerous submissions in this proceeding, the Commission has decided to authorize teletext service and to regulate it under the open market approach as proposed in the *Notice*. Thus, the rules we are adopting authorize licensees of both full service and low power television stations: (1) to operate teletext

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[14] CBS stated that cable head-end processors are designed to transmit a television broadcast signal meeting the minimum transmission standards of Section 73.687 of the Rules. It noted that head-ends are not designed to carry the Idealized Picture Transmission Amplitude Characteristic of Section 73.699, Figure 5 of the Rules. Therefore, the design of the video bandpass filter in such processors might not accommodate teletext signals. CBS submitted that equipment designed or modified to be compatible with the idealized amplitude characteristic should be capable of transmitting teletext.

services and (2) to choose both the kinds of service to offer and the technical systems for transmitting the data signals.[15] The only major limiting factor in the authorization is that teletext operations must not interfere with the regular broadcast service of the originating station, the signals of other broadcast stations or the signals of non-broadcast radio stations.

Authorization of Teletext Service

42. *Reasons for authorizing Teletext Service*—We have concluded, as have all commenters, that authorization of teletext service is in the public interest. In this regard, the record in this proceeding clearly establishes that teletext offers opportunities for substantial enhancement of service in the public interest through its capabilities for enlarging and diversifying the operations of television stations as well as enhancing the means by which individuals can secure communication services they seek. The many variations of consumer and business-oriented applications of teletext attest to the value of this medium for encouraging new kinds of services. It also is apparent from the unanimous support for authorization in the comments and the high level of developmental activity in both the service provision and equipment manufacturing sectors of the industry that there is significant and substantial interest in implementing teletext service. The Commission also feels that teletext authorization would increase the efficiency of broadcast television spectrum use.

43. The record also indicates that teletext transmissions are technically compatible with existing broadcast televi-

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[15] On August 18, 1982 the Commission received a petition for rule making from the *Loudon Times-Mirror* requesting that low power television stations be allowed to transmit teletext. Because the authorization we are adopting applies to both full service and low power stations the request in this petition is completely encompassed in this proceeding. *The Loudon Times-Mirror* petition will therefore be treated as comments.

sion transmission standards. The experience from the various field trials on licensed stations shows that useable teletext signals can be transmitted on the VBI without degrading the quality or reception of the main television program signal or producing interference to other stations. Thus, teletext authorization will permit a significant expansion of broadcasters' capabilities for transmitting information with virtually no adverse effect on other existing services.

44. *Types of Teletext Services to be Permitted and Franchise/Lease Arrangements*—In order to provide authority for the widest possible range of individual applications and services, the Commission is defining teletext only in general terms. Because teletext generally is understood to be a visual display medium, we believe it is appropriate to follow the proposal in the Notice and define it as a data system for the transmission of textual and graphic information intended for display on viewing screens.[16] In this regard, teletext data may be related to or associated with a station's normal programming or it may address subjects wholly unrelated to broadcast programs or activities. In this latter regard, we are making appropriate changes to Part 2 of the rules to permit teletext message services that are of a point-to-point or point-to-multipoint nature. We also believe it appropriate to expand the teletext definition to include data that is useful to widen and enhance the utility and service of teletext information, even though this latter data is not necessarily intended for display. Such non-display data must be directly related either to some feature to enhance the utility of the display function or to control equipment designed for secondary use of the display data. This expanded definition will permit coded data and presentation instructions for virtually any image pattern a licensee may wish to transmit and for operation of audible signals to attract a users attention to specific

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[16] *See, Notice, supra* at para. 30.

information presented through the display function. In addition, it will provide for special instructions for controlling equipment that is peripheral to the viewing screen and for reformatting teletext data for storage on a secondary device. Specific examples of functions that can be initiated by such instructions include control of printers for hard copy items, such as reports and coupons, and data storage devices for subsequent use of the teletext data.[17] We believe that extending the teletext definition to allow transmission of codes to enhance use of the display data is consistent with the overall concept of teletext as discussed in the *Notice* and will significantly increase the range of benefits that can be obtained from teletext services.

45. Consistent with the above, stations will be permitted to engage in service to the public at large, limited segments of the public with special interests, individual firms, organizations, and persons. The authorization allows business and subscription operation as well as conventional advertiser supported service for the general public. This broad authorization will allow licensees to realize the most efficient and effective use of teletext, while imposing the least amount of governmental regulation. However, as discussed *infra,* some particular services may be subject to common carrier regulation.

46. The Commission recognizes that some stations might wish to operate their teletext service on a franchise basis

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[17] The teletext definition adopted herein will not permit the transmission of software to allow the user to manipulate interactively images or data that are in an intermediate form not to be decoded directly for viewing. This includes material such as video games, computational routines and other data intended for manipulation of data to dynamically revise or originate new information, and new data intended for input to some other processing system. The Commission believes that to expand the definition to allow this kind of data could or would be to permit transmission of material that cannot be properly termed teletext, even though it may be transmitted using teletext technology. However, we are considering the initiation of a separate rule making proceeding with regard to these potential uses of the VBI.

or to lease space to multiple users. While such arrangements will be permitted under the new rules, licensees are advised that they remain responsible for all broadcast related teletext provided via their station's facilities, whether produced inhouse or obtained from outside sources. In this context, it is emphasized that the Commission considers teletext to be an ancillary service of broadcasters. Therefore, as discussed *infra*, teletext will be regulated generally as an ancillary broadcast service under Part 73 of the Commission's rules. Point-to-point and point-to-multipoint teletext activities will be regulated according to the appropriate private radio or common carrier regulatory structure and rules.

47. Finally, stations will be permitted to initiate or terminate service at their discretion without notifying the Commission.[18] Similarly, there will be no requirement for maintaining teletext program logs. While such requirements have been made a part of other subsidiary authorizations in the past, there is no indication that such record keeping and reporting requirements are necessary in the case of teletext.[19]

48. There are several reasons why the Commission has decided to use the open regulatory approach described above. First, there are many potential uses for teletext, and the different applications tend to be divergent in nature and, in some cases, with respect to technical require-

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[18] However, initiation or termination of common carrier services rendered via teletext may require administrative action. *See* paras. 66, 68, *infra*.

[19] The Commission's rules currently requires licensees of FM radio stations to make formal application for a Subsidiary Communication Authorization (SCA) and to keep logs for SCA operations (Sections 73.293 and 73.295(e) of the Commission's Rules). The *Notice of Proposed rule Making* recently adopted in BC Docket 82-536 examines that possibility of changing or deleting these and other rules relating to FM SCA's.

ments. Second, while very little is known about the market for teletext services, it is clear that the demand for its services will not be homogeneous. Based upon previous trials and tests of teletext, it appears that the need for an importance of the various applications are likely to vary across different markets and user groups. For example, it may develop that the demand in a single television market might be such that one station would focus on an advertiser-supported consumer oriented service. A second station might offer a restricted access subscriber service, while a third might provide a business data service. It is even possible that a single station would choose to offer more than one type of service, either at different times or concurrently, using different VBI lines or some other multiplexing technique. Third, the pattern of demand for service surely will shift over time as user interests change and new types of services are conceived and implemented. Market forces can be expected to provide amounts and types of service that are responsive to users' willingness and ability to pay for them. Thus, the open market approach provides a system for resolving trade-offs among various services and different technical systems' characteristics and prices.

49. Moreover, it would be very costly and difficult for the government to attempt to develop and apply specific performance regulations and standards to meet the wide variety and changing needs of teletext service. There also would be considerable risk that the results of such efforts would not provide an optimal policy solution. However, the open market approach offers features that allow it to provide for the needs of users with a minimum of involvement by the government. Its primary advantage stems from the fact that it relies on the forces of competition to direct the production and employment of resources to meet diverse user needs and preferences. Market forces can be expected to provide the amounts and types of services that

are responsive to users' willingness and ability to pay for them.

50. *Teletext Authority for Public Broadcasting Stations*—In keeping with our efforts to identify and provide alternative sources for financing the operation of public television stations and our generally open approach to teletext, we are authorizing public television stations to engage in teletext services and to offer such services on a profit-making basis. Public stations are permitted the same discretion with respect to services and technical systems as commercial stations.

51. This action also reflects recent shifts in policy toward public broadcasting that have been enacted by Congress. It is clear from the Public Broadcasting Amendments Act of 1981 that Congress does intend, and expect, public television stations to provide more of their own support. In fact, the 1981 Amendments Act was enacted in large measure to make it easier for public stations to independently increase their revenue base. *See* Public Broadcasting Amendments Act of 1981, PL 97-35, 97th Cong., 1st Session.

52. We believe that authorization of profit-oriented teletext service by public broadcasters is consistent with the applicable statutory requirements and authorizations. The Act's only pertinent restriction is that any offering of services for remuneration "shall not interfere with the provision of public telecommunications services . . ."[20] After studying the 1981 Amendments and the accompanying legislative history, the Commission is of the opinion that remunerative teletext activities would not constitute such interference. There is nothing in the Act to indicate that Congress intended to prohibit public broadcasters from offering such enhanced services.

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[20] *See* Section 399B of the Communications Act of 1934, as amended (47 USC §399(b)).

53. *Teletext as an Ancillary Service*—Generally, teletext is expected to provide services that are ancillary to the regular broadcast audio-visual program service of television stations. As an ancillary activity, teletext will not be required to further or promote a station's performance with respect to its public service obligation as it relates to programming.

54. Although the comments supported our proposal in the *Notice* that the political broadcasting requirements in Section 312(a)(7) and 315 of the Act should not apply to teletext, several respondents requested that we further explain the legal basis for our conclusion. As discussed below, we have concluded that, as a matter of law, these sections need not be applied to teletext service. Further, because of teletext's unique characteristics as a print medium and an ancillary service of broadcasting, we think application of these provisions to teletext is both unnecessary and unwise as a matter of policy.[21]

55. Section 312(a)(7) requires licensees to "allow reasonable access for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. §312(a)(7). We believe the statutory requirement of affording reasonable access is adequately satisfied by permitting federal candidates access to a licensee's regular broadcast operation; it does not require access to ancillary or subsidiary service offerings like teletext. This conclusion is consistent with our previous determinations regarding the applicability of Sec-

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[21] Of course, to the extent that teletext is provided on a common carrier basis, we believe that these statutory provisions are inapplicable for other reasons as well. *See Report and Order on Interim Direct Broadcast Satellite Service*, 90 FCC 2d 676 (1982). Similarly, subscription teletext services may be classed as a "hybrid" point to point service outside the true broadcast mode, and, hence, not subjected to these statutory requirements. *See also WTFL Broadcasting Educational Telecommunications Association, Inc.*, 49 F.C.C. 2d 948 (1974).

tion 312(a)(7) to other variant broadcast services, such as subscription television services. *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 F.C.C. 2d 1079, 1093 (1978). In that proceeding we held that it would ordinarily be unreasonable for a licensee to deny access to its prime time audience, 68 F.C.C. at 1090, because "prime time generally is the period of maximum audience potential." *Id.* at 1093. However, we noted that

> those stations engaged in STV would have their periods of maximum audience potential outside of normal prime time viewing periods. Therefore, we do not believe that reasonable access requires STV stations to make available to Federal candidates those periods of time in which they are engaged in STV programming.

Id. Similarly, because of their ancillary nature, teletext offerings will not provide a candidate access to the broad television audience attracted to the station's regular broadcast operation. *See also Greater Washington Educational Telecommunications Association, Inc.*, 48 F.C.C. 2d 948 (1974) (Fairness Doctrine and Section 315 not applicable to FM SCA operations). Accordingly, we perceive no legal requirement that licensees grant federal candidates access to their teletext service offerings.

56. We also conclude that Section 315 is not applicable to teletext offerings. The equal opportunity requirement in Section 315 is triggered by a broadcast "use" by a candidate.[22] The term "use" is defined as a personal ap-

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[22] That provision states, in pertinent part, that:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for

pearance by a legally qualified candidate by voice or picture. *Law of Political Broadcasting and Cablecasting,* 69 F.C.C. 2d 2209, 2218, 2240 (1978). Teletext, however, is inherently not a medium by which a candidate can make a personal appearance. It is designed to provide only printed words and graphics and thus does not allow a candidate to deliver a personal message to the public. Moreover, as discussed more fully below, teletext transmissions, given their dissimilarity to traditional broadcast programming, are likely to be utilized and regarded differently by those accessing them and thus are not susceptible to whatever potential abuse of broadcast facilities that Congress sought to forestall in enacting the equal opportunities provision. *See Felix v. Westinghouse Radio Stations,* 186 F. 2d 1 (3rd Cir. 1950.) Accordingly, because the problem envisioned by Congress will not arise in teletext services, and because of the fundamental dissimilarity between teletext and the types of broadcast "uses" envisioned by Congress in Section 315, we also conclude that the equal opportunities requirement need not be applied to teletext services.

57. In 1959, Congress amended Section 315(a) to exclude certain types of news programming from the "equal opportunities" requirement, and, in doing so, added language recognizing the Commission's Fairness Doctrine policy.[23] In our view, Congress' purpose in adding this

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that office in the use of such broadcasting station . . . .

It applies "only to the personal use of radio facilities by the candidates themselves," and not to such use by a candidate's supporters. *Felix v. Westinghouse Radio Station,* 186 F.2d 1, 5 (3rd Cir. 1950), *cert. denied,* 341 U.S. 909 (1951).

[23] The relevant language provides that

> Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter

language was solely to ratify the Commission's then-existing policy concerning application of the Fairness Doctrine to news broadcasts. *See, e.g., Red Lion Broadcasting* v. *FCC,* 395 U.S. 367, 385 (1969). The Senate report specifically states that Congress' action exempting news programming from equal opportunities obligations does not diminish or affect in any way Federal Communications Commission policy or existing law . . ." Senate Rep. No. 562, 86th Cong. 1st Sess. 13 (1959).

58. By simply ratifying the FCC's Fairness Doctrine policies in 1959, Congress did not require nor prohibit possible extensions of that policy in the future. *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 385 (1969). Therefore, the 1959 legislative enactment concerning the Fairness Doctrine in Section 315 does not mandate extension of the Fairness Doctrine to new services like teletext, which did not even exist at the time when Congress acted. Rather, any determination concerning this question is one which has been entrusted t our sound judgment and discretion in the first instance.[24] Indeed, in light of the important First Amendment considerations raised by application of the Fairness Doctrine to new communications services, we are reluctant to extend these policies unless we find there is a compelling reason to do so. "Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act." *CBS* v. *DNC,* 412 U.S. 94, 110 (1973).

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to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

[24] We reach the same conclusion even if we assume, *Arguendo,* that the 1959 amendment functioned to incorporate the Fairness Doctrine as a statutory requirement since, regardless of how Congress' action is characterized, it seems clear that novel services such as teletext were beyond its scope.

59. After careful consideration of this question, we conclude that the Fairness Doctrine should not be applied to teletext services. Our determination stems primarily from a recognition that teletext's unique blending of the print medium with radio technology fundamentally distinguishes if from traditional broadcast programming. The special First Amendment treatment accorded to broadcasting under existing law is based largely upon a premise that the limited number of broadcast frequencies justifies curtailing the First Amendment rights of broadcasters in order to accommodate the parallel rights of viewers and listeners. *Red Lion, supra,* 395 U.S. at 390. Implicit in the "scarcity" rationale, however, is an assumption that broadcasters, through their access to the radio spectrum, possess a power to communicate ideas through sound and visual images in a manner that is significantly different from traditional avenues of communication because of the immediacy of the medium. Whether or not this assumption constitutes a sufficient basis for circumscribing the first amendment rights of those engaged in broadcasting, at a minimum, it is not apparent that similar reasoning should apply to teletext service. Indeed, it seems probable that teletext—a textual means of communication primarily not employing sound and pictures—more closely resembles, and will largely compete with, other print communication media such as newspapers and magazines. This assumption is amply borne out by the many comments in this proceeding suggesting that teletext will be used for providing services such as the direct video delivery of newspapers and magazines to homes. In this arena of competition, which includes all other sources of print material to which the public has access, we are not persuaded that must be accorded special First Amendment treatment in order to protect the public's right of access to conflicting views on issues of public importance. To justify that result would require a substantial showing that teletext, solely because it utilizes a different method of delivery to readers, is

likely to overshadow all other print sources of information. No basis exists in this record for such a finding. Indeed, it seems equally plausible that teletext may suffer inherent disadvantages in terms of format and convenience to readers that outweigh any benefits afforded by its different method of delivery.

60. Furthermore, we believe it would be undesirable for other reasons to extend these doctrines to teletext. As noted previously, it is widely believed that teletext may be used to provide an alternative method for the delivery of newspapers and other print media to consumers. However, many commenters have questioned whether such services would ever be economically viable if licensees are burdened with Fairness Doctrine obligations. We are persuaded that the likelihood of licensees' embarking upon these types of endeavors will be substantially affected by our determination to apply, or not apply, traditional broadcast policies like the Fairness Doctrine. We have no desire to block from the outset full development of this promising new service by the unreflective application of requirements that appear fundamentally unsuitable and which are not legally required. Such a course would be inconsistent with our statutory responsibility to promulgate policies that are responsive to the characteristics of new communications services so as to encourage, not frustrate, their development. 47 U.S.C. §§151, 303(g). Consequently, we believe the public interest is better served by not subjecting teletext to Fairness Doctrine obligations.

Regulatory Status of Teletext Services

61. As discussed above, teletext is being authorized for a wide range of services, most of which bear little, if any, relationship to the traditional forms of broadcasting. As ancillary activities, such services would not materially conflict with use of the television frequencies for the normal broadcast purposes to which their allocation is intended. However, circumstances could arise under which teletext

service might take on characteristics of either communications common carriers or private carriers. For example, teletext might be used for some form of common carrier visual alert (*e.g.*, console display, not paging) or notification service (*e.g.*, electronic messages and/or mail).[25] Other forms of teletext, such as business data services, could involve only the provision of transmission facilities and, depending on how they were offered, might be similar to private carrier radio systems. Therefore, the teletext rules include provisions for applying the appropriate type of regulations to any private or common carrier teletext services.[26]

62. In *National Association of Regulatory Utility Commissioners* v. *F.C.C.* ("NARUC I"), the Court specifically stated that a carrier will not be considered a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal. 525 F. 2d 630 at 641 (D.C. Cir. 1976), *cert. denied,* 425 U.S. 922 (1976). The Court stressed that a company's clientele was not necessarily dispositive of the issue since common carriers in particular situations need not serve the entire public and private carriers may serve a significant portion of the population. The Court then reasoned that:

> "Since given private and common carriers may therefore be indistinguishable in terms of the clientele actually served, it is difficult to envision a sensible line between them which does not turn

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[25] It appears that paging service, including conventional tone or tone and voice based paging, may be a potential VBI use. Since paging was beyond the scope of the *Notice,* we will issue a *Further Notice of Proposed Rulemaking* to explore such uses in the near future.

[26] To the extent, of course, that teletext services are offered in a broadcast mode, no novel questions of regulatory classification arise. Such services will be regulated consistent with our established treatment of ancillary services of a broadcast nature such as broadcast-related FM subcarriers (e.g., functional music).

> on the manner and terms by which they approach and deal with their customers." *Id.* at 642.

Assuming that no legal compulsion is present that requires an entity to offer its services on an indiscriminate basis, the court indicated that a finding of common carrier status would turn on whether a particular entity actually operates as a common carrier, that is, whether the carrier "undertakes to carry for all people indifferently."

63. The court then listed several factors indicative of whether the service offerings of a particular carrier could indeed be classified as common carriage. The establishment of medium-to-long contractual relationships with customers was considered inconsistent with the concept of an indifferent holding out. The court stated that a private carrier could be expected to serve a relatively stable clientele, with terminations and new clients the exception rather than the rule. Not holding out facilities indifferently would mean that the service provider would desire and expect to negotiate with and select future clients on a highly individualized basis. We note, in this connection, that the existing demands for a licensee's spectrum and the licensee's methods of operation may be sound bases for accepting or rejecting an applicant. Thus, a licensee's use of the facilities may make an indifferent holding out inherently impractical or impossible. Such activity would necessarily preclude common carrier classification. 525 F. 2d at 643. Nonetheless, as the court noted in *NARUC I,* if a particular service provider behaves like a common carrier, common carrier regulations should be applied. Accordingly, with the exception of mobile radio services as noted below, whether common carrier obligations attach to teletext service that merely involves provision of transmission facilities will be determined by the manner in which the licensee conducts its business.

64. With regard to land mobile services, the Communications Amendments Act of 1982, Section 120, estab-

lishes a demarcation between private and common carrier land mobile services, and indicates that the test contained in the new Section 331(c) of the Communications Act is intended to supersede the *NARUC I* standard. Public Law No. 97-259, 96 Stat. 1087. The Act defines a "Mobile Service" as " . . . a radio communication service carried on between mobile stations or receivers and land stations, . . ., and includes both one-way and two-way radio communication services." Public Law 97-259 at Section at 120(b)(2), 96 Stat 1097, 47 U.S.C. 153(n). To the extent that teletext services may constitute mobile radio services within this definition, they will be governed by the new legislation, and such services will be judged by the test in the new Section 331(c). The new statutory test is based on the manner in which a multiple licensed or shared private land station is interconnected with a telephone exchange or interexchange service or facility.[27] *See also,* H.R. Rep. No. 765, 97th Congress, 2nd Session, pp. 52-56 (1982).[28] The statute also makes it clear that it it is a private system, it is, exempt from state and local regulation. 47 U.S.C. 331(c)(3).

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[27] New Section 331(c)(1) of the Act provides that ". . . private land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users (other than a nonprofit, cooperative station) shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains such interconnection directly from a duly authorized carrier; or (B) licensees jointly obtain such interconnection directly from a duly-authorized carrier."

[28] The Commission's interpretation of the test in the new legislation will be fully explored in our reconsideration of the *Second Report and Order,* Docket No. 20846, 89 F.C.C. 2d 741 (April 8, 1982), and our treatment of land mobile services herein is expressly subject to the outcome of that proceeding.

65. The determination as to whether a particular service offered by teletext is private or common carriage is, in the first instance, the responsibility of the licensee and must be made in accordance with the *NARUC I* test for all non-broadcast related services except mobile radio. For mobile radio services, the new Section 331(c) standard will govern.

66. Once a licensee has determined that the proposed service is common carriage under the appropriate standard, it must seek authorization to provide that service from the Common Carrier Bureau (and state commissions, as appropriate). Because existing broadcast licensing procedures may not afford the needed mechanism by which necessary Commission determinations related to common carrier service offerings can be made, we will require any licensee intending to provide such services via teletext first to seek authorization by filing a suitable request under Parts 21 or 22, as appropriate. See 47 C.F.R. Parts 21 and 22. Public notice will be given of each such request received, and a 30-day period will be afforded to all parties wishing to file comments in connection therewith. After considering any comments submitted and the substance of the underlying request, the Commission will issue a decision disposing of the matter. It is our intention that, in seeking such authorizations, the teletext operator will be in the same position, entitled to the same privileges and subject to the same obligations and regulations as a traditional offeror of such services.[29] For example, the Commission has established as a general matter that competition in the provision of certain common carrier services is in the public interest. *See, e.g., Specialized Com-*

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[29] The nature and scope of any common carrier duties that would attach could be affected, *inter alia*, by the result of the Commission's competitive carrier proceeding. *See Deregulation of Telecommunications Service* 84 F.C.C. 2d 445 *(Further Notice of Proposed Rule Making,* 1981).

mon Carrier Decision, 29 F.C.C. 2d 870 (1972), *aff'd sub nom. Washington Utilities and Transportation Commission* v. *FCC,* 513 F. 2d 1142 (9th Cir. 1975); *Graphnet Systems, Inc.,* 71 F.C.C. 2d 471 (1979), *aff'd sub nom. Western Union Telegraph Co.* v. *FCC,* 665 F. 2d 1112 (D.C. 1981); and *MTS and WATS Market Structure,* 81 F.C.C. 2d 177 (1980). Therefore, our policy is that applications to provide common carrier services from qualified applicants will be granted unless there is some basis to believe that such grant "is likely to produce results that conflict with the goals of the Communications Act." *MTS/WATS, supra* at 200. This policy applies equally to teletext operators proposing to provide these common carrier services.

67. Licensees seeking to provide private carrier teletext services must notify the Licensing Division of the Private Radio Bureau at Gettysburg, Pennsylvania, 17325, by letter, prior to initiating service. In the letter, they must certify that their facilities will be used in this regard only for permissible purposes. *See* 47 C.F.R. Parts 90 and 94. When providing land mobile service, they must also certify that service will be offered only to users eligible under Part 90 of the Commission's Rules, and that any interconnection of the station with a telephone exchange or interexchange service or facility will be obtained in accordance with new Section 331 of the Communications Act, *supra.* Such notifications will not give rise to a comment period, and no separate authorization will be issued by the Commission. As in the case of common carrier services, the teletext operator offering a private service will be in the same position, entitled to the same privileges and subject to the same obligations and regulations as a traditional offerer of such services.

68. In all cases, involving either private or common carrier services, the applicant will not be seeking approval for its technical facilities. The Commission regards teletext use as a secondary privilege that runs with the primary television license. That right is conferred on the primary

station licensee only.[30] In this regard, it should be noted that a television broadcaster that elects to use its teletext capacity for private or common carriage remains a broadcaster for all other purposes. Only the use of the VBI for nonbroadcast related teletext purposes would be regulated in accordance with private radio or common carrier regulations. *See NARUC* v. *FCC,* 533 F.2d 610 (D.C. Cir. 1976).

69. We recognize that there may be situations in which the delivery of services via teletext enjoys a competitive advantage over other carriers by virtue of the greater service area of some television stations. If we were to limit the transmitting facilities of teletext service offerors to equal that of competing carriers, however, we would be diminishing many of the spectrum efficiencies that we hope to gain through this proceeding. Furthermore, restrictions on the technical facilities of the teletext operator would necessarily constrict the coverage of the primary broadcast signal. This would subvert our basic allocations and spectrum utilization policies with respect to the broadcast service. On balance, therefore, we believe any possible inequity in technical facilities is overshadowed by the public interest benefits to be derived from innovative and spectrum-efficient teletext services that are possible under the decision herein. *See* 47 U.S.C. 303(g) which provides, *inter alia,* that the Commission should " . . . generally encourage the larger and more effective use of radio in the public interest."

Authorization of Transmission Systems

70. After reviewing the comments, the Commission has determined that individual licensees should be permitted

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[30] A licensee may choose to lease its teletext will create capacity to an entity that will provide or common carriage service. In such cases, the lessee may seek the appropriate authorization, but the primary licensee remains responsible for the technical operation of the transmitting facilities, including the VBI.

discretion to select the technical system for teletext transmission that best suits their individual needs. The many divergent applications and uses for teletext will create broad opportunities for the success of technical variations and of specialized systems. It also is evident from the comments and the ongoing process of developmental activity that there is considerable interest in and support for alternative systems. The open market approach we are adopting will allow licensees the freedom of choice necessary to operate teletext services tailored to their own specific situations and to respond to changes in demand and technical options. One of the major advantages of the open market approach is that it will provide a mechanism for resolving the trade-offs among system features and prices that are extremely difficult for regulatory decision makers to resolve. While several major technical alternatives have been available for some time now, very little is known about the actual market for teletext services in terms of what users want and the strength of their demand. Without such information, only informed guesses can be made with respect to the level of sophistication and kind of features a system has to support. Additionally, authorization of teletext without standard system avoids what almost certainly would be years of delay in initiating service while the Commission attempted to specify standards for a single system. The open market approach thus facilitates introduction of teletext service at the earliest possible date.[31]

71. Finally, the open market approach will also facilitate the evolution and growth of the teletext services over time. As users' needs and technological capabilities change, the

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[31] The Commission is also aware that cable and telephone systems that do not have to secure regulatory permission to engage in teletext and videotex activities are moving forward in testing and implementing such services. We believe that a delay in authorization of similar service for broadcasters might unjustifiably deprive the public of a greater choice of teletext services.

development of new features and new systems can progress unencumbered by the costs and delays associated with changing government regulations. We believe that this kind of flexibility is especially important for teletext in light of the fact that its initial development is still not complete.

72. As noted, *supra*, those parties who supported adoption of a single system standard pointed out that there are some potential costs associated with a market approach in this area. They suggested that a common transmission system would ensure that a single decoder design could receive and interpret the teletext signals of all the stations in any market in the country. It was their belief that a common system would alleviate much uncertainty on the part of broadcasters, manufacturers and consumers.

73. However, the Commission believes that any attempt by it to select a single system may well lead to a less than optimal choice. For example, if decoders for the system selected proved unnecessarily expensive for viewers, teletext service might fail to get off the ground or would be delayed until a more appropriate system could be chosen and new decoders could be built. Likewise, if the system selected did not provide a level of sophistication adequate to suit user tastes, teletext development might be similarly impeded. Thus, a single system standard might actually work to restrict the development of teletext. Moreover, the Commission cannot ensure the success of new media forms and services that may arise through the progress of technological development. The public will determine which media forms succeed. Thus, our role is to provide a regulatory structure that will permit new media services maximum freedom to develop according to the evolving requirements of the marketplace.

74. As discussed in the *Notice*, the Commission recognizes that it is possible for a single system to emerge through market forces under the open system approach. If there is sufficient demand for teletext and the only way

to adequately meet this demand is for all service providers to use a common system, then we expect that market forces will bring forth a single system standard.

75. *VBI Lines Authorized for Teletext Use*—To provide for maximum flexibility and service potential, teletext signals will be authorized on lines 14-18, and 20 of the VBI. Additionally, lines 10-13 will be made available on a phase-in basis over the next several years as proposed in the Notice. The signal level permitted on line 14 initially will be significantly lower than that authorized for the other lines but will be gradually increased over time as receiver designs are modified to accommodate higher VBI signal levels. This provides seven lines for teletext use now and an additional four in the future. These lines are authorized on a permissive use basis only and are not reserved for the exclusive use of teletext. Indeed, teletext already will be sharing some of these lines with other applications, such as the vertical interval test signal (VITS) on lines 17 and 18 and source identification codes (SIDS) on line 20.[32] We believe that this approach to authorization will allow us to give full consideration to other new uses of the VBI that may arise in the future without prejudice to teletext and that it will have no significant detrimental effect on the development or use of teletext.

76. *Teletext and the Line 21 System for Closed Captions*—A number of commenting parties expressed concern that direct competition between profit oriented teletext service and nonprofit caption service will adversely affect service for the hearing impaired if profit oriented teletext is allowed to operate on line 21. They further argued that the decoders for the line 21 system will become obsolete

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[32] On December 17, 1981, the Commission deleted the requirement that remotely controlled television television stations transmit VITS on lines 17 and 18. However, VITS signals still are permitted on these lines. See *Report and Order in BC Docket 81-239*, 47 Fed. Reg. 3789 (January 27, 1982).

and the investment in such equipment will be lost if captions are transmitted on teletext rather than the line 21 system.

77. On the other side of this issue, the evidence in the record indicates that broadcasters do not expect in the near future to use all of the lines proposed for teletext authorization in the *Notice*. In fact, while there was widespread support for a broad authorization of VBI lines, including line 21, no one indicated any plans to use line 21. Most broadcasters stated that their current intentions were to use lines 15-18 for teletext. Thus, it does not appear essential that line 21 be authorized for teletext at this time.

78. In view of the apparent lack of immediate demand for line 21 on the part of the industry and the concerns of the hearing impaired with respect to potential teletext impact on closed caption service, the Commission has decided to adopt an approach that will withhold authorization of teletext on line 21 for a period of five years and will reconsider its decision at the end of that time. Postponement of Action in this area will provide an opportunity to observe the development of both teletext and the line 21 caption system.

79. We note that those parties now providing caption service are doing so voluntarily, *i.e.* they are not required to provide captions. The Commission applauds the commitment of efforts and resources to closed caption service on the part of broadcasters, producers, private funding sources, and others in the industry. We encourage all industry participants and other interested parties to continue to provide and expand such services for the hearing impaired.

80. *Technical Rules for Operation*—As shown in Appendix B, the technical rules governing operation of teletext are for the most part written in general terms. They are intended principally to ensure that teletext signals do not

interfere with other radio frequency services or degrade reception of the originating stations' regular programs. These rules, which are very similar to those proposed in the *Notice*, are designed to permit a broad range of alternative systems to operate to meet particular service needs. The only specific limitation is that placed on signal level. The 80 IRE unit maximum signal level that is being authorized for most lines is lower than the 100 IRE unit level originally proposed. This decision reflects our concern for the interference potential of higher signal levels that was discussed by several of the commenting parties. In addition, from the comments and other information available to the Commission, it appears that 80 IRE units will provide adequate signal strength to serve the requirements of all of the known technical systems and will also facilitate the operation of a wide range of other technical options. If, in the future, higher signal levels are needed, the Commission can reconsider this limit. In any case, the general provision against interference takes precedence over the use of any signal level that causes or results in unacceptable interference to other services. Line 14 is being authorized at a signal level of 40 IRE units through 1987 and this will be raised gradually to the 80 IRE level over the succeeding years. This will avoid potential degradation from line 14 use to reception of regular programs on some existing receivers. The schedule for phasing in lines 10-13 also increases the permissible signal levels on these lines over time.

81. One of the most important aspects of teletext interference is the potential for teletext signals to degrade significantly the ability of home television receivers to display regular programming. Because the performance capabilities of individual receivers vary considerably across both models and manufacturers, the most reasonable way to gauge the extent of receiver degradation appears to be to examine the proportion of the relevant receiver population that is affected. This approach was discussed in the

Notice and a one-percent threshold limit was proposed. Although the comments were generally not opposed to this proposal, the Commission has decided not to include a threshold limit for receiver degradation in the rules. After carefully considering this issue, we believe that a specific standard in this area might ultimately prove too inflexible for adequately evaluating and limiting degradation of receiver performance in individual situations. Nevertheless, we do intend that teletext activities not interfere with regular program service. Therefore, as a matter of policy we will use the one percent of the receiver population figure discussed in the *Notice* as a general guideline for limiting teletext degradation of reception of regular television service.

82. *Adaptive Equalizer Pulses*—The rules provide authority for use of an adaptive equalizer pulse on any of the VBI lines approved for teletext to aid in the correction of multipath errors. While it appears that a device such as that suggested by the Antiope and Telematics Corporation would offer a more spectrum efficient solution since it could perform this function without transmission of a separate reference signal, the Commission believes that any decision to use a reference pulse is best left to the licensee's discretion. The use of such pulses on a non-reserved, discretionary basis will not affect the spectrum resources of stations that choose not to use an error compensation technique or that use a method that uses the data itself as a reference point. The Commission has decided not to authorize reference pulses in the vertical synchronizing waveform at this time because we have received no information concerning the potential of such signals in this area to degrade the performance of television receivers.

83. *Visual Emergency Messages*—The new rules also provide that any visual emergency messages transmitted pursuant to Section 73.1250 of the rules are to replace closed captions during an emergency situation. This action

extends the policy in the line 21 rules that requires visual emergency messages on the main signal to replace closed captions on the viewing screen in order to resolve potential conflicts between open and closed captions in a single emergency. Thus, any teletext system used to provide closed caption service must have a facility for giving way to visual emergency messages during periods when captioning is being provided.

84. *Treatment of Teletext Decoders Under Part 15 of the Rules*—Finally, on the matter of the treatment of external teletext decoders under Part 15 of the Rules, the Commission anticipates that there will be two basic categories of such external devices. These categories, and their associated treatment under Part 15 are:

(1) A teletext decoder, separate and external to a TV set, that supplies a modulated RF signal to the antenna input terminals of a television receiver—This is a TV Interface Device, subject to Part 15 Subpart H.[33] The decoder must in this instance be type approved.

(2) A teletext decoder, separate and external to a TV set, that uses digital circuitry to decode the teletext signal and provides output at video baseband—This is a Class B computing device, subject to verification by the manufacturer and the requirements of Part 15, Subpart J.

85. The treatment of decoders built-in to a TV receiver will depend on the arrangement of the receiver and decoder components. If the teletext signal is fed directly to the TV video amplifier circuits, the TV receiver requirements in Part 15, Subpart C, apply to the entire unit. On the other hand, if the teletext signal is fed to the TV receiver front end, the decoder will be treated separately as a Class I TV device. In either case, Sections 15.65 through 15.68 of the rules will not apply to teletext decoder circuitry, provided that a switch is included to permit

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[33] *See*, footnote 11, *supra*.

reception of the normal television signal when not in the teletext mode.

Policy With Respect to Cable Carriage of Broadcast Teletext

86. In the *Notice* we asked whether cable systems should be prohibited from deleting teletext signals and, if so, whether such a policy should apply only to "must carry" stations. As noted above, some commenters maintained that cable companies should be required to carry teletext. NAB requested that we require carriage of all teletext in order to simplify copyright decisions that the *WGN* case will necessitate.

87. Initially, we note that since the filing of the comments, the decision in *WGN* has been reversed and remanded.[34] The Court of Appeals held that a teletext program and a conventionally broadcast program intended to be viewed in conjunction with one another (although on separate channels) constitute one copyrightable work. Specifically, the Court in *WGN* stated (at pages 6-7):

> United Video appears to concede, correctly in our view despite an absence of judicial authority on the point, that if WGN's teletext were intended to be overlaid on the television images of the nine o'clock news, in the manner of captions for deaf people or English subtitles for foreign movies, if would be covered by the copyright for that news. Cf. 1 Nimmer, Nimmer on Copyright § 2.09[A] (1981). It would be part of the performance intended to be seen by the viewer and thus one of the "related images" of which station 101 speaks . . . .
>
> There is no paradox in suggesting that teletext is covered by the copyright on a regular televi-

[34] *See*, footnote 13, *supra*.

> sion program provided that it is intended to be viewed with and as an integral component of that program, even though we have just said that WGN's teletext is to be shown on a different channel from the nine o'clock news, which means that it cannot be viewed simultaneously, as subtitles are . . . .
>
> [I]f WGN wants to create multi-channel news or entertainment for viewers willing to switch back and forth between channels, we cannot find anything in the Copyright Act to prevent it from copyrighting its video smorgasbord.

Thus, copyright protection for teletext is available to broadcasters to the extent noted above independent of any action we take here.

88. It seems clear however, that the communications policy concerns underlying our mandatory carriage requirements[35] are quite distinct from the considerations properly relied upon by the court in the *WGN* case to determine the scope of copyright protection for teletext services. NAB's suggestion, therefore, that cable television systems be required to carry teletext as a means of simplifying copyright determination is, in our view, neither appropriate nor required by the *WGN* decision. Indeed, given both their ancillary and discretionary nature, teletext transmissions are plainly not analogous to the types of services that we have traditionally accorded mandatory carriage status.[36] Accordingly, we will not require cable television systems to carry teletext services.

Conclusion

89. The Commission believes that teletext offers significant potential as a new media form and that its benefits

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[35] *Cable Television Report and Order*, 36 F.C.C. 2d 143, 173 (1972).

[36] *See, e.g., Report and Order Authorizing Low Power Television Service*, 47 Fed. Reg. 21468, 21492 (released May 18, 1982).

can be realized most effectively in an environment that for the most part is free of government intervention. The many diverse and varied applications for this technology provide opportunities for service tailored to the interests of mass audiences, specialized groups, and individuals. The regulatory structure we are providing is intended to allow the broadcast industry the flexibility to develop and offer service that is specifically suited to the requirements of individual applications and to alter this service to meet changing conditions in a dynamic environment.

Implementation

90. We believe that the public interest would be served by making these rules effective upon adoption of this *Report and Order*. There are a number of outstanding experimental authorizations and special temporary authorizations (STAs) relating to teletext. We are also aware that some parties within the industry are prepared to begin immediate operation of teletext services on a production rather than test basis. Thus there is clear evidence that the industry desires and is ready to begin teletext services at the earliest possible time. In view of these factors, it appears that immediate implementation of the teletext rules would serve to further the development of services the Commission finds to be in the public interest. Therefore, the rules set forth in Appendix B will be effective with the adoption of this *Report and Order*.

Procedural Matters

91. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final regulatory flexibility analysis is as follows:

I. Need for and Purpose of the Rules.

The Commission has concluded that permitting a portion of the television vertical blanking interval to be used for teletext would enhance the public interest by providing

opportunities for extending and diversifying service from television stations and for improving the efficiency of spectrum utilization.

II. Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

A. *Issues raised*

1. No issues or concerns were raised specifically in response to the initial regulatory flexibility analysis. However, a number of issues and points that pertain to small business were mentioned in the comments. Most of these remarks were positive, although a few expressed concern that the open market approach would lead to uncertainties and other problems that might impede teletext development.

B. Assessment

1. The Commission views the absence of specific claims of adverse impact with respect to its teletext proposals as indicative of their lack of potential for negative effects on small businesses. We also believe that the uncertainties of the market approach are factors that must be addressed in the course of virtually all business decisions and that these factors ultimately work to ensure better, more effective use of the VBI.

C. Changes made as a result of such comments: None.

III. Significant Alternatives Considered and Rejected.

The Commission's other alternatives were: (1) not to authorize teletext at all or (2) to adopt a more restrictive approach such as a single system technical standard. To deny authorization would be to forego the beneficial objectives sought in this rule making. Similarly, a more restrictive approach to regulation likely would interfere with realization of the full potential and benefits of teletext and

would represent an unnecessary intrusion by the government into the affairs of private businesses.

92. Authority for adoption of the rules contained herein is contained in Sections 2, 4(i), and 303 of the Communications Act of 1934, as amended.

93. Accordingly, IT IS ORDERED, that Parts 2, 73, and 76 of the Commission's Rules ARE AMENDED as set forth in Appendix B, effective June 27, 1983, and the CBS petition for reconsideration IS DENIED. In addition, IT IS ORDERED that the request by the PLEAD Committee to accept late-filed comments IS DENIED.

94. For further information concerning this proceeding, contact Alan Stillwell, Mass Media Bureau, (202 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Attachments: Appendices

Appendix A
Parties Filing Formal Comments in the Teletext Proceeding

1. Gallaudet College
2. Hazeltine Research
3. Community Telecasters of Southern California - Filed as comments in support of the CBS petition for reconsideration.
4. American Speech-Language-Hearing Association
5. Cognitive Science Laboratory/University of California, San Diego
6. Time Incorporated
7. Zenith Radio Corporation
8. Koplar Communications, Inc.
9. Taft Broadcasting Company
10. Alexander Graham Bell Association for the Deaf, Inc.
11. Times-Mirror Videotex Services, Inc.
12. United Kingdom Teletext Industry Group
13. Subscription Television Association
14. Satellite Television Association
15. American Newspaper Publishers Association
16. National Association of Public Television Stations
17. University of Wisconsin
18. Telidon Videotex Systems, Inc.
19. Bonneville International Corporation
20. WGBH Educational Foundation
21. National Association of Broadcasters
22. RBC Communications
23. Public Broadcasting Service
24. Border Broadcast Stations
25. National Captioning Institute
26. Videotex Industry Association
27. Tribune Company Broadcasting, Inc.
28. American Broadcasting, Companies, Inc.
29. National Broadcasting Company, Inc.
30. American Society of Travel Agents
31. RCA Corporation
32. Association of Maximum Service Telecasters, Inc.

33. Field Communications Corporation
34. Cox Broadcasting Corporation
35. Satellite Television Corporation
36. Golden West Broadcasters
37. NMC Television Network Affiliates
38. Storer Broadcasting Company
39. CBS, Inc.
40. Springfield Television Corporation
41. National Cable Television Association
42. Corporation for Public Broadcasting
43. E. Marshall Wick
44. Antiope and Telematics Corporation
45. Joint Comments of Cable Systems
46. MultiVisions, Ltd.
47. Media Access Process
48. National Association for the Deaf
49. Radofin

Other Major Items

1. AMC-Working Paper No. 1 on the Teletext Experiment in Washington
2. Neustadt, Skall, and Hammer-The Regulation of Electronic Publishing
3. National Association for the Deaf (Informal Comments)
4. EIA—Interim Report

Responses to the CBS Petition for Reconsideration

1. National Cable Television Association
2. United Kingdom Teletext Industry Group
3. Time Incorporated
4. Antiope and Telematics Corporation
5. National Association of Broadcasters
6. Telidon Videotex Systems, Inc.
7. Community Telecasters of Southern California (treated as comments in proceeding per request of respondent)
8. CBS, Inc. (reply)

Teletext Reply Comments

1. Midwest Radio-Television, Inc.
2. Corporation for Public Broadcasting
3. Videotex Industry Association
4. Association of Independent Television Stations
5. Tribune Company Broadcasting
6. National Captioning Institute, Inc.
7. Louisiana Television Broadcasting Corporation
8. Metropolitan Pittsburgh Public Broadcasting, Inc.
9. National Broadcasting Foundation
10. WGBH Educational Foundation
11. Storer Broadcasting Company
12. Springfield Television Corporation
13. National Association of Public Television Stations
14. Koplar Communications, Inc.
15. Taft Broadcasting Company
16. United Kingdom Teletext Industry Group
17. MultiVisions, Ltd.
18. Bonneville International Corporation
19. Zenith Radio Corporation
20. National Citizen's Committee for Broadcasting
21. National Cable Television Association, Inc.
22. RCA Corporation
23. Association of Maximum Service Telecasters, Inc.
24. National Association of Broadcasters
25. Antiope and Telematics Corporation
26. Telidon Videotex Systems, Inc.
27. CBS, Inc.
28. Time Incorporated (in response to Senatorial Letter)

APPENDIX B

Chapter I of Title 47 of the Code of Federal Regulations are amended and revised as set forth below.

1. Section 2.106 is amended by revising the Table of Frequency Allocations and adding new footnote NG142 to read as follows:

§2.106 Table of Frequency Allocations

Band (MHz)	Service	Class of Station	Frequency	Nature OF SERVICES	
7	8	9	10		
.	.	.	.	.	
54-72	BROADCASTING (NG142)	Television broadcasting	55.25	Video	Channel 2
			59.75	Sound	
			61.25	Video	Channel 3
			65.75	Sound	
			67.25	Video	Channel 4
			71.75	Sound	
.	.	.	.	.	
76-88	BROADCASTING (NG142)	Television broadcasting	77.25	Video	Channel 5
			81.75	Sound	
			83.25	Video	Channel 6
			87.75	Sound	
.	.	.	.	.	

174-216	BROADCASTING (NG142)	Television broadcasting	175.25	Video	Channel 7
			179.75	Sound	
			181.25	Video	Channel 8
			185.75	Sound	
			187.25	Video	Channel 9
			191.75	Sound	
			193.25	Video	Channel 10
			197.75	Sound	
			199.25	Video	Channel 11
			203.75	Sound	
			205.25	Video	Channel 12
			209.75	Sound	
			211.25	Video	Channel 13
			215.75	Sound	

• • • • •

470-512	BROADCASTING	Television broadcasting		BROADCASTING
	(NG142) LAND MOBILE (NG66) (NG114)	Land Mobile Base	INDUSTRIAL LAND TRANSPORTATION DOMESTIC PUBLIC	

• • • • •

512-806	BROADCASTING (NG142)	Television broadcasting	

• • • • •

NG142 TV broadcast stations authorized to operate in the bands 54-72, 76-88, 174-216, 470-512, and 512-806 MHz may use a portion of the television vertical blanking interval for the transmission of teletext messages, on the condition that harmful interference will not be caused to the reception of primary services, and that such teletext service must accept any interference caused by primary services operating in these bands.

• • • • •

2. New Section 73.646 is added to read as follows:

Section 73.646 Teletext service.

(a) Teletext is a data system associated with a television broadcast signal that is used for the transmission of textual and graphic information intended for display on the screens of suitably equipped receivers and of data that is intended to enhance the use of teletext information.

(b) TV broadcast stations are authorized to transmit teletext data during any time period, including portions of the day when normal programming is not broadcast. Such transmissions must be in accordance with the technical provisions of §73.682.

(c) Teletext service is of an ancillary nature and as such is an elective, subsidiary activity. No service guidelines, limitations, or performance standards are applied to it other than the definitional aspects of the authorization. The kinds of services teletext may be used to provide include, but are not limited to, advertiser supported consumer information, subscription data services, and business-oriented information.

(d) Teletext services that are common carrier in nature are subject to common carrier regulation. Licensees operating such services are required to apply to the Commission for the appropriate authorization and to comply with all policies and rules applicable to the service. Responsibility for making the initial determination of whether a particular activity is common carriage rests with the licensee. Initial determinations submitted by licensees are subject to Commission examination and may be reviewed at the Commission's discretion.

(e) The grant or renewal of a TV station license or permit will not be furthered or promoted by proposed or past teletext operation; the licensee must establish that its broadcast operation is in the public interest wholly apart from teletext activities. (Violation of rules applicable to

teletext operation would, of course, reflect on a licensee's qualifications to hold its broadcast license or permit.)

(f) In all arrangements entered into with outside parties affecting non common carrier teletext operation, the licensee or permitted must retain control over all material transmitted in a broadcast mode via the station's facilities, with the right to reject any material that it deems inappropriate or undesirable.

3. Section 73.621 is amended by revising the headnote and adding new paragraph (f) to read as follows:

Section 73.621 Noncommercial educational TV stations.

* * * * *

(f) Teletext service. The provisions governing teletext service in §73.646 are applicable to noncommercial educational TV stations.

4. Section 73.682 is amended by adding new paragraph (a)(24) to read as follows:

Section 73.682 Transmission standards

(a) * * *

* * * * *

(24) Specific scanning lines in the vertical blanking interval may be used for the purpose of transmitting teletext signals, subject to certain conditions:

(i) Teletext may be transmitted on LInes 10-18 and 20, all of Field 1 and Field 2. Use of specific lines is to be in accordance with Schedule I.

(ii) No observable degradation may be caused to any portion of the visual or aural signals.

(iii) Teletext signals must not produce emissions outside the authorized television channel bandwidth. Data pulses must be shaped to limit spectral energy to the nominal video baseband.

(iv) Transmission of emergency visual messages pursuant to §73.1250 must take precedence over, and shall be cause for interrupting, teletext that provides a visual depiction of information simultaneously transmitted on the aural channel.

(v) A reference pulse for a decoder associated adaptive equalizer filter designed to improve the decoding of teletext signals may be inserted on any portion of the vertical blanking interval authorized for teletext, in accordance with the signal levels set forth on Schedule I.

(vi) All lines authorized for teletext transmissions may be used for other purposes upon prior approval by the Commission

* * * * *

5. Section 76.64 is revised to read as follows:

Section 76.64 Carriage of subscription television broadcast programs and teletext information services.

The provisions of §§ 76.57, 76.59, 76.61, and 76.63 do not require carriage of any subscription TV broadcast program or any teletext information service.

Schedule I

	1983	1984	1985	1986	1987	1988	1989	1990	1991
10	X	X	X	X	X	50 IRE	→	→	70 IRE
11	X	X	X	X	X	50 IRE	→	→	70 IRE
12	X	X	X	X	X	50 IRE	→	→	70 IRE
13	X	X	X	X	X	70 IRE	80 IRE	80 IRE	80 IRE
14	40 IRE					70 IRE	80 IRE	80 IRE	80 IRE
15	80 IRE	→	→	→	→	→	→	→	→
16	80 IRE	→	→	→	→	→	→	→	→
17	80 IRE */**	→	→	→	→	→	→	→	→
18	80 IRE */**	→	→	→	→	→	→	→	→
19	***	→	→	→	→	→	→	→	→
20	80 IRE **	→	→	→	→	→	→	→	→

* Also authorized for Vertical Interval Test Signals (VITS) that are used with remote controlled transmitters.

** Also authorized for SID signals (Source Identification signals).

*** Presently reserved to the Vertical Interval Reference (VIR) signal.

March 31, 1983

Separate Statement of
FCC Commissioner James H. Quello

In re: Authorization of Teletext Transmissions by TV Stations, BC Docket No. 81-741.

My decision not to support mandatory cable carriage of teletext should not be interpreted to indicate any reduction in my strong commitment to continuing the mandatory cable carriage rules as they apply to conventional television programming. In my view, the strong justification for imposing these requirements—protecting the availability of local broadcast service to the public—does not apply to the ancillary teletext service. Therefore, I concluded it would not be proper to extend the rules' effects to this new service.

When the Commission declined to require cable television carriage of subscription television stations, it stated that "concern with the impact on broadcast service to the public. . .provided the most fundamental bases (sic) for the mandatory carriage rules."[1] The Commission recognized that cable carriage was not fundamental to the survival or economic success of STV stations, and thus it did not require such carriage.[2] This reasoning applies with equal force to teletext service.

Preserving the availability of conventional local broadcast service is a sound basis for the cable carriage rules. I am concerned that applying these rules to protect teletext would be an overextension of the Commission's authority which could ultimately undermine the Commission's valid exercise of authority in this area.

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[1] *Memorandum Opinion and Order—Signal Carriage Rules—STV*, 77 FCC 2d 523, 528 (1980), *aff'd sub nom. WWHT, Inc. v. FCC*, 656 F. 2d 807 (D.C. Cir. 1981).

[2] *Id.* at 528.

When the teletext signal is an integral part of conventional broadcast programming (*e.g.*, closed captioning), mandatory carriage obligations may properly attach. It is my understanding, however, that existing copyright law can protect teletext carriage in this situation without Commission intervention.[3] Should the state of the law change on this subject, I might well support a limited revisiting of the Commission's decision.

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[3] *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F. 2d 622, *rehearing denied*, 693 F. 2d 628 (7th Cir. 1982).

March 31, 1983

Concurring Statement
of
Commissioner Anne P. Jones

In Re: Amendments of Parts 2, 73 and 76 of the Commission's Rules to Authorize Transmission of Teletext by TV Stations. (BC Docket No. 81-741)

I agree with the basic decision and many of the subsidiary decisions in this proceeding, such as to continue reserving line 21 for closed captions and to leave selection of the technical system for teletext transmission largely to the discretion of each licensee electing to provide this service. However, much of the reasoning given for these and the other decisions announced in this Report and Order seems to me a case of pouring new wine in old bottles. It just doesn't work very well.

For one thing, there is to my mind a basic inconsistency between the justification given for permitting broadcasting licensees to use the vertical blanking interval (VBI) to provide teletext while at the same time exempting teletext from broadcasting regulation. On the one hand it is said that the VBI is part of the spectrum licensees are authorized to use. On the other hand, teletext is said to be a different service which, because it "more closely resembles, and will largely compete with, other print media, such as newspapers and magazines," should be exempt from the Fairness Doctrine and the political broadcasting laws. This sounds to me like having one's cake and eating it too.

This inconsistency also raises an issue of broader significance. As broadcast technology evolves, new uses of broadcast spectrum become possible. Teletext is just one example. Since existing broadcast licensees are already authorized as such to use spectrum, they have immediate access to the frequencies necessary to offer teletext, even

though this service was not and could not have contemplated by either the Commission or the broadcasters when the broadcasting licenses were initially issued. I think it is entirely appropriate for the Commission to ask whether existing broadcast licensees necessarily have an implied exclusive franchise to offer new services on their assigned frequencies.

If the Commission desires to establish new markets in communications service made possible by advancing technology, it should consider the competitive implications of an incumbent licensee's automatic access to the spectrum. To enable new participants to enter the market for new communications services, the Commission may wish to redefine the nature of the implicit "Spectrum rights" granted to broadcast licensees. Early resolution of this issue might greatly expand opportunities for participation in the communications industry by minorities and other groups who have not as yet participated extensively in the growth and development of telecommunications services.

Another notion in this Report and Order which strikes me as peculiar is the suggestion that licensees proposing to offer teletext in competition with existing common carrier service may be themselves regulated as common carriers. I can think of nothing more likely to chill an innovative new service than a threat that it may be burdened with common carrier regulation. Of course such may be the law, but I believe we should at least note that, it if is, it makes very little sense.

And finally, a consideration which I find curiously absent from this Report and order is the fact that in many respects teletext may compete head-to-head with videotex provided on an unregulated basis as an "enhanced service" under our Computer II decisions. Surely this fact is a major reason for regulating teletext as little as possible, or even not at all, so as not to disadvantage it in this competition.

It may be that on these points and others this Report and Order is the best we can do at present, and I do not advocate delaying authorization of teletext while we ponder a more elegant way to explain our regulatory treatment of it. I therefore concur.

STATEMENT

OF

COMMISSIONER HENRY M. RIVERA
IN WHICH COMMISSIONER JOSEPH R. FOGARTY
JOINS
DISSENTING IN PART

RE: Authorization of Teletext Transmissions by Television Stations

I dissent to that part of the Commission's *Report and Order* that permits cable television systems to delete teletext provided on the vertical blanking interval of broadcast signals entitled to must carry status. Although I have substantial reservations about the must carry rules in general, I believe the Commission should maintain the *status quo* pending a plenary reexamination of this complex area. Instead, the majority has decided to chip away at the rules, beginning another exercise in disjointed policymaking. The vigorous advocacy on both sides of the teletext must carry issue underscores the considerable symbolic significance of this decision and the inappropriateness of the majority's piecemeal approach.

The must carry rules decree that a broadcast signal entitled to cable carriage shall be carried in its entirety, except where technically infeasible.[1] Teletext is offered on the vertical blanking interval, which is an integral part of a broadcast signal.[2] It logically follows therefore, that teletext provided on a signal with must carry status is en-

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[1] See 47 C.F.R. §76.55(a).

[2] Thus, the issue before us is unlike that posed by whether to mandate carriage of LPTV signals; an LPTV transmission is technically unrelated to any existing signal entitled to cable carriage. Furthermore,because the issue here, as I see it, is whether to maintain the *status quo* on the must carry rules, I see no need for this agency to require carriage of teletext provided via distant signals. *See* 47 C.F.R. §76.55(b).

titled to carriage without alteration. While it may be true that teletext did not exist when the must carry rules were first adopted and therefore was not considered when the signal carriage duty was formulated, a narrowing construction here unduly tips the balance on the larger policy issue toward cable interests. It is my understanding that most cable systems are technically capable of carrying teletext.[3] To avoid the regulatory favoritism resulting from a contracted interpretation of "signal" under our rules, the Commission should have required carriage of teletext, thereby preserving the rules in their current form pending reexamination of cable system rights and duties vis-a-bis broadcast signals *as a whole.*

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[3] Parties have asserted that some older cable systems cannot carry teletext without spending an unreasonable amount of money for system modification. I would grandfather such cable systems; when the must carry rules were adopted, those systems could not have planned for teletext. The Commission is fully capable of fashioning a rule of reason for determining a cable system's eligibility for grandfathering.

CONCURRING STATEMENT OF COMMISSIONER STEPHEN A. SHARP

Re: *Report and order,* BC Docket No. 81-741
Transmission of Teletext by TV Stations

I welcome the authorization of television broadcast teletext services. As a result, I can only concur in this decision because part of it inevitably inhibits the development of this technology.

My disagreement lies with the majority's decision to permit a cable television operator to strip the teletext service offered by the broadcaster on the vertical blanking interval (VBI) portion of the television signal, and substitute its own teletext service. The Commission licenses a broadcaster to transmit a signal on a particular channel of which the VBI is an integral part. The VBI cannot exist without the rest of the signal; it is merely an increment of time which uses the same spectrum as the main part of the signal. I cannot rationalize permitting the deletion of this part of the signal while prohibiting the deletion of program content or commercials.

More importantly, the sanctioning of stripping the VBI by a cable operator, which may be an anticompetitive action, may well stifle investment in teletext service by broadcasters. As an infant service, broadcast teletext depends on a large potential audience in order to attract enough advertising to make it profitable. Even under the best conditions, the profitability of teletext may be marginal. Where the broadcaster is faced with a potential loss of audience equal to cable penetration because the cable operator may strip the VBI, the broadcaster may be unwilling to risk investing in this new service. While the majority seeks to stimulate competition, its action will have the opposite effect by discouraging the initial investment by broadcasters in teletext.

I disagree also with the notion that copyright remedies are sufficient to protect broadcasters' investment in tele-

text service. The limited scope of the *WGN* decision and the uncertainty surrounding any general protection for teletext appear to afford insufficient protection to encourage the investment necessary to bring this service to the public in a meaningful way.

It is suggested that to consider the VBI as part of the broadcast signal, rather than looking to the type of service which is offered, is to invite the full panoply of broadcast regulation to the teletext service. To the extent that such regulation applies, I am prepared to accept it. I am not convinced, however, that this would occasion much, if any, additional regulation for broadcasters.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations.	BC Docket No. 81-741 RM-3727 RM-3876

ERRATUM

Released: May 20, 1983

The fourth sentence of paragraph 75 of the *Report and Order*, FCC 83-120, released May 20, 1983, in the above-entitled matter contains an error. In the text, this sentence reads "This provides seven lines for teletext use now and an additional four in the future." The corrected sentence is "This provides six lines for teletext use now and an additional four in the future."

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext TV Stations.	BC Docket No. 81-741 RM-3727 RM-3876

ERRATUM

Released: June 2, 1983

The effective date for implementation of the Teletext rules,as specified in the first sentence of paragraph 93 of the *Report and Order*, FCC 83-120, released May 20, 1983, in the above-entitled matter is incorrect. In the text, the effective date is "June 27, 1983". In fact, the Commission made the rules effective upon their adoption. The corrected effective date is thus "March 31, 1983".

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
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APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations.	BC Docket No. 81-741 RM-3727 RM-3876

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1984 Released: January 24, 1985

By the Commission: Commissioner Rivera dissenting in part and issuing a statement at a later date.

1. The Commission has before it the "Petitions for Reconsideration" filed by sixteen parties in response to its action authorizing broadcast television stations to operate teletext services, *Report and Order,* 48 FR 27054 (published June 13, 1983).[1] The petitioners seek reconsideration of our policy decisions in the following six areas: 1) the definition of teletext, 2) authority for public broadcasters to operate remunerative services on the text channels of the line 21 caption system, 3) public service obligations associated with Section 312(a)(7) and 315 of the Communications Act, as amended, 4) regulation of private and

[1] Eleven parties also submitted responses either supporting or opposing the requests for reconsideration, and five parties filed replies to the responses. A complete list of the parties filing petitions, responses/oppositions, and replies on any aspect of teletext reconsideration and lists of the parties participation on each of the major issue requested for reconsideration are provided in Appendix A.

common carrier teletext services,[2] 5) cable retransmission of broadcast teletext, and 6) the date the rules were made effective.[3] These issues will be treated in turn.

Teletext Definition

2. Four petitioners request that the definition of teletext be expanded to permit transmission of material not intended for, or related to, visual display purposes.[4] the petitioners believe that there is no reason to delay authorization of non-display data transmissions. They state that the Commission should move forward in this preceding to allow the widest possible use of teletext technology. Geller, *et al.* (Geller) states that the Commission is repeating the case of FM subcarriers where for years it "unnecessarily restricted subcarrier transmission to 'broadcast-type' transmissions." The National Association of Broadcasters (NAB) argues that the current definition poses another unnecessary obstacle to the full development of teletext. It states that the market should decide whether other services are a proper use of this technology. The Public Broadcasting Service (PBS) does not agree with the Commission's view that teletext is generally understood to be only a visual display medium. The submissions of other parties that addressed this issue, including those filing responses, offer similar arguments for expanding the definition.

3. The petitioners' arguments and statements for expanding the definition of teletext are essentially the same

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[2] The Commission decided one aspect of the common carrier services issue, that of whether to preempt state regulation of teletext common carrier services, in a separate action. See para. 22, *infra.*

[3] Geller, *et al.* also requested that the Commission consider requiring teletext capability in new color television receivers. As this request is beyond the scope of this proceeding and the action in the *Report and Order*, it is being denied without discussion.

[4] Examples of non-display uses include transmission of video game, raw data (consumer or commercial), and computer software.

as those that the Commission considered and rejected in the *Report and order*.[5] In establishing the definition for teletext, the Commission sought to provide authority for the widest possible range of applications and services that is within the generally understood concept of teletext as a visual display medium. Thus, teletext was defined as a data system for the transmission of textual and graphic information intended for display on viewing screens. This definition was expanded slightly to allow transmission of data signals that are useful to widen and enhance the usability of the teletext information in a non-display context. We continue to believe that petitioners' requests are beyond the scope of this proceeding and that there is no basis for changing he definition of teletext adopted in the *Report and Order*. Nevertheless, the Commission wishes to reiterate that in limiting teletext to essentially display purposes, it did not take a position on a more generalized authority that would permit other kinds of data signals on the vertical blanking interval (VBI).[6]

Remunerative Services By Public Broadcast Stations

4. In its petition, the University of Wisconsin System (UWS), the licensee of noncommercial station WHA-TV, requests that the Commission extend to public broadcasters the authority to operate "for profit" or remunerative services on the two text channels of the line 21 caption system.[7] UWS currently provides a full-time news,

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[5] *Report and Order* at paras. 9, 10, and 44.

[6] The Commission initiated a separate proceeding to consider authorization of data signals on the VBI in a *Notice of Proposed Rule Making*, adopted on February 15, 1984 (49 FR 10556, published March 21, 1984).

[7] In the *Notice*, the Commission had proposed to make line 21 of the VBI available for teletext on a general basis. This would have allowed all forms of teletext, including the current caption system, to be transmitted on line 11 and would have granted authority for public broad-

weather and public service announcement service for the hearing impaired on one channel and a farm/agribusiness service on the other. In support of its request, UWS submits that sponsorship income would help continue these service and facilitate their eventual transfer to teletext delivery.

5. PBS and the National Captioning Institute (NCI) indicate their support for he basic concept of UWS's proposal, which is that public broadcasters be allowed to operate remunerative services on the two line 21 system text channels. However, they disagree with UWS's suggestion that this policy be implemented through a change in the text of Section 73.682 of the Rules.[8] PBS offers the opinion that commercial services can be transmitted on the line 21 system by noncommercial stations under the existing rules.[9] PBS is concerned that he changes sug-

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casters to offer remunerative services on line 21 using either teletext technology or the existing caption system with its two text channels. After reviewing the record on this proposal, the Commission decided to withhold the general authorization of teletext on line 21 for a period of give years, after which it would reconsider its policy on this issue. The effect was to allow noncommercial broadcasters to operate remunerative services on teletext, but not on the text channels of the line 21 system.

[8] The modifications to Section 73.682 proposed by UWA are:

(1) In subparagraph (a)(22)(ii), delete the underscored:

(ii) At time when line 21 is not being used to transmit a program related data signal, *data signals that are not program related may be transmitted, PROVIDED: The same data format is used and the information to be displayed is of a broadcast nature.*

(2) Replace with:

Teletext services authorized in Section 73.646(c) may be transmitted, provided the same data format is used.

[9] PBS states that the only apparent reason for UWS's assumption that it cannot operate commercial services on line 21 is the restriction in Section 73.621(e) that generally prohibits public stations from providing commercial services.

gested by UWS would allow teletext on line 21. NCI shares this concern and emphasizes the view that the Commission should continue to preclude teletext from line 21. It suggests that the relief requested by UWS be provided through an interpretation of the rules that would simply state that Section 73.621(e) does not apply to use of line 21. In its reply, UWS acknowledges the statements of NCI and PBS and withdraws its petition to the extent that it sought to extend teletext authorization to line 21. It lets the petition stand in seeking clarification of the applicability of Section 73.62(e) to use of line 21 text facilities.

6. The Commission agrees with the petitioners that it would serve the public interest to allow public broadcasters to operate remunerative services on the text channels of the line 21 caption system. Such authority for public broadcasters would be consistent with the Commission's policy allowing them to use their teletext facilities on a remunerative basis as an alternative source of financing and would not be expected to inhibit or interfere with provision of non-commercial caption service.

7. The Commission does not wish to lend ambiguity to the rules in the sense that it might e providing a general authorization to use line 1 for teletext. Therefore it will not implement the change to Section 73.682 that was suggested by UWS in its original filing. Instead, the Commission is adding a new paragraph (g) to Section 73.621 to explicitly indicate authority to transmit non-program related signals on line 21 for remunerative activities. This new paragraph (g) is set forth in Appendix B.

Teletext as Ancillary Service—Sections 312(a)(7) and 315 of the Communications Act

8. In the *Report and Order,* the Commission concluded that, as a matter of law, Sections 312(a)(7) and 315 of the Act need not be applied to teletext. It further stated that because of teletext's unique characteristics as a print me-

dium and an ancillary service of broadcasting, it believed application of these statutory provisions is both unnecessary and unwise as a matter of policy.

9. Two parties, *MAP and Geller* challenge the Commission's decision not to apply fairness and political broadcasting regulations to teletext services. MAP argues three points. It first charges that the Commission violated Section 553(c) of the Administrative Procedures Act (APA), 5 U.S.C. 553(c), in that it failed to mention or ask comment on the applicability of the equal opportunity, reasonable access, lowest unit rate charge and fairness doctrine requirements to teletext in the *Notice.* MAP then argues that the Commission incorrectly held that the law does not require the application of fairness/political broadcasting rules to teletext. Finally, MAP contends that the Commission failed to consider such rules as a matter of policy under the public interest standard. It requests that the Commission issue a new *Notice of proposed Rulemaking* to provide opportunity for full public participation on this issue.

10. Geller agrees with the Commission that fairness/political broadcasting regulations should not be applied to teletext, but is of the opinion that the Commission's arguments supporting this policy are inadequate and that, in fact, it cannot legally exempt teletext service from such regulation. Geller suggests as an alternative approach that the Commission adopt a policy whereby it would not entertain complaints in these areas with respect to teletext, but instead would examine public interest issues in the context of license renewal and state that it would reexamine the need for new policies based on experience.

11. The NAB responds to MAP and Geller on this issue and defends the Commission's decision as procedurally correct, good law, and sound policy. In response to MAP's charge that the Commission gave inadequate notice of its intention not to apply fairness and political broadcasting

obligations to teletext, the NAB Points to paragraph 17 of the *Notice* and states that it is difficult to understand the contention that this was not adequate notice. The NAB further submits that the fact that eight parties, including MAP itself, addressed the issue suggests strongly that there was adequate notice.

12. The Commission disagrees with MAP's contention that it did not provide adequate notice on the issue of the applicability of the political broadcasting requirements and the Fairness Doctrine to teletext. As stated by the NAB, the fact that eight parties, including MAP itself, commented on this issue is clear indication that there was adequate notice. Accordingly, MAP's request that the Commission issue a new *Notice of Proposed Rule Making* to study this issue is being denied.

13. The issue of whether the law requires that political broadcasting and Fairness Doctrine requirements to be applied to teletext were fully considered by the Commission in the *Report and Order.*[10] Neither MAP nor Geller present any new facts in support of the position that political broadcasting and Fairness Doctrine obligations must be applied to teletext as a matter of law.[11] Rather, the arguments of both MAP and Geller merely repeat arguments that the Commission considered and rejected in its own analysis. Further, the question raised by MAP as to whether fairness and political broadcasting rules should be applied as a matter of policy was decided in the *Report and Order.*[12] The approach suggested by Geller, whereby the Commission, as a matter of policy, would examine such issues only in the context of renewal, is similarly unwarranted in view of the Commission's decision on this matter. Accordingly, petitioners' requests for revisions to the Com-

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[10] *Report and Order,* paragraphs 54-60.

[11] *Id.,* paragraphs 55-58.

[12] *Id.,* paragraph 54.

mission's teletext policy with respect to Sections 312(a) and 315 of the Act are being denied.

14. We think it is useful at this juncture, however, to more extensively discuss the nature and scope of four findings in this area to assure that petitioners and the public understand both the narrow scope of the issues involved here, and the basis upon which we make these findings. First, we dispute the contrary implications of some petitioners and reaffirm our intention to pursue continued enforcement of these content-related broadcast laws, policies and rules until and unless they are altered by ourselves or by other competent authority.[13] This, however, in no way alters or diminishes our authority and responsibility to interpret and apply these as necessary when novel questions and circumstances arise. This is particularly true as in this situation where new services are being authorized that could not or were not contemplated when Congress passed related statutory provisions nor when this Commission enacted rules and policies designed to give force to these provisions. Our attention is further focused in this area where the changing nature of the industry due both to competitive and technological flux requires us to give primary concern to the First Amendment implications of our actions. Second, we note that the question of content regulations as specified in Title III of the Communications Act and as elaborated in our rules and policies need only be addressed in what we reasonably expect will be a very narrow range of situations, *i.e.,* where television broadcasters will be offering teletext services in a manner that is closely related to traditional print media,and especially where teletext is used for the retransmission of media such as newspapers and magazines.[14] However, we

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[13] *See* e.g., *Syracuse Peace Council,* FCC 84- , adopted October 26, 1984; *Notice of Inquiry,* FCC 84-140, released May 8, 1984, paragraph 3.

[14] We need not address separately material transmitted by teletext

note that to date this service has not yet gone beyond the early experimental stage and that many of those who have made experimental offering of this service have not yet found a mix of offerings that appears clearly destined to find widespread consumer acceptance. Because no preferred mode of operation relative to our statutory regulatory schemes has emerged, we believe it is particularly important to be cautious at this stage so as not to make sweeping predictions and rigid regulatory decisions. In light of the apparent market difficulties of this emerging technology, we are reluctant to add unnecessary regulatory burdens where no showing of need for regulation yet exists.

15. Notwithstanding the preliminary nature of our findings, we think it is necessary and appropriate here to reaffirm our decision in the *Report and Order* to forbear from applying traditional broadcast content controls on broadcasters even when they offer teletext service in a broadcast mode. In this context we view our decision here as no way inconsistent with the court's views in *NAB v. FCC,* 740 F. 2d 1190 (D.C. Cir. 1984), for the reasons detailed below. We consider teletext clearly as an ancillary service not strictly related to the traditional broadcast mode of mass communication. First, the very definition of teletext confined the service to traditional print and textual data transmission. See para. 3, *supra.* Thus, although these data will be transmitted at some point through the use of the electromagnetic spectrum, its primary and overriding feature will be its historical and cultural connec-

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that is clearly related to and substantially a part of a broadcast program,such as second language translation or captioning for the deaf. We assume that these special and limited transmissions will merely duplicate and enhance their associated broadcasts. Thus, any question of statutory content regulation for these transmission can and would necessarily be fully contained within the ordinary resolution of such questions in the traditional broadcast context, and we find no need to apply additional and distinct treatment for the teletext transmission.

tion to the print media, especially books, magazines and newspapers. Users of this medium will not be listening or viewing teletext in any traditional broadcasting sense, but instead will be *reading* it, and thus be able to skip, scan and select the desired material in ways that are incomparable to anything in the history of broadcasting and broadcast regulation.[15] In this light, we believe that the content regulations created for traditional broadcast operations are simply out of place in this new print-related data transmission medium. We decline to attribute to Congress an intent to extend broadcast content regulation, such as those contained in Section 315, to this new medium. Even if we were to assume that Congress intended for Section 315 to apply, that section imposes no new duties under our existing and longstanding rules enforcing that provision. For example, one threshold criterion for the application of Section 315 has been "use" by a candidate for public office. In general, this "use" criterion requires that in order for Section 315 to apply, a candidate's voice or picture must appear on the program or announcement in such a way that they will be identified by member of audience. Such a "use" is not possible in the context of teletext, just as it would not be possible in any of the traditional media consisting exclusively of text. Congress has been fully cognizant of our implementation rules in this area and we can reasonably assume their concurrence with our interpretations here.

16. Along the same lines, we note that affirmative access obligations, such as those contained in Section 312(a)(7) for federal political candidates, can be satisfied by the broadcaster over the main channel. Guided as we are in

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[15] We also note that functionally the electromagnetic transmission of these services can be compared with the state of the art in modern newspaper production where news is often gathered, edited and formatted in one location, and then sent by satellite to remote locations for printing and eventual delivery.

such matters by a reasonableness standard, we find that a broadcast could satisfy the "reasonable access" rights of a candidate without use of teletext. Thus, whether or not Congress intended these provisions to apply to teletext, the duties they impose are met by main channel service anyway. This satisfaction of current Sections 315 and 312(a)(7) obligations by the main channel buttresses our conclusion that these content duties should not be extended to teletext.

17. In this regard, we are also guided by the paramount consideration given by this Commission, the Congress, and the Supreme Court to all issues related to the First Amendment, and the overriding intent of all these institutions to ensure that these fundamental freedoms are not unwarrantedly abridged. Our decision to forbear is driven by such concerns, and we take as our lead here the decision of the Supreme Court in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 1974, where the Court unanimously invalidated a Florida statute creating a right for candidates to equal space to reply to criticism in newspapers. The Florida right to reply is substantially equivalent to the law and policy we would be creating here if we applied Section 315 to teletext transmissions offered in a "broadcast" mode. As the Court found there, we find that neither the letter nor the purposes of the First Amendment would be served by such a ruling. Quite simply, this Commission would be required to intrude into the editorial judgments of teletext editors. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, the content, and treatment of public official—whether fair or unfair—constitutes he exercise of editorial control and judgement. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time" *Id.* at 258. Given this clear statement of the Court, and the historical sensitivity of the Congress

to these issues, we are unable to construe and intent of Congress to apply Section 315 and similar statutory provisions, and our associated rules and policies, to the teletext medium.[16]

Regulatory Status of Teletext Services

18. As discussed in the *Report and Order,* the teletext authorization permits a wide range of service applications, many of which do not resemble traditional forms of broadcasting. The Commission recognized that some teletext activities could take on the characteristics of common carrier or private carrier services and therefore included provisions in the rules to regulate such services in an appropriate manner. Under the policies and rules the Commission set forth in the *Report and order,* private carrier and common carrier services are subject to rules governing similar existing services.

19. The NAB petitions the Commission to reverse its decision on the regulatory status of non-broadcast related teletext and refrain from imposing common carrier status on any form of teletext service. It also requests that the Commission preempt state and local common carrier regulations that would otherwise apply to teletext.

20. The underlying thesis of the NAB's position is that to allow the form of teletext to determine its regulatory status will cause great confusion for service providers and needless delays in the initiation of teletext service. It argues that the Commission should not substitute common carrier regulation for market dynamics and that to impose

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[16] For instance, some of the current teletext operations involve newspaper publishers. Suppose a newspaper decided to deliver its service by teletext, as opposed to delivery of hard copy. We are reluctant at this juncture to change the First Amendment protection afforded the print medium because of this change in delivery mode, absent sufficient justification for less protection.

such regulatory burdens is contrary to the entire purpose of authorizing teletext.

21. In support of its position, the NAB argues that common carrier regulation is inconsistent with teletext's ancillary status. First, it states the opinion that to impose common carrier status on some forms of teletext ignores the fact that a licensee has a responsibility to exercise control over everything transmitted over its channel, including the VBI. According to the NAB, under common carrier law the licensee would be prohibited from exercising the control necessary to fulfill this responsibility. The NAB further argues that that common carrier status would contravene Section 3(h) of the Communications Act which states, in relevant part, that:

> "...but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. 3(h)

The NAB contends that the Commission's policy of regulating teletext in accordance with the nature of the service and the manner in which it is offered increases both the cost and risk associated with developing some forms of teletext. The NAB states that it would be costly and difficult for stations to make initial determinations regarding service type under the *NARUC I* test and that good faith determinations that a service was not common carriage would be subject to challenge.[17] Finally, the NAB indicates that the burdens imposed by state common carrier regulation are often worse than those of federal regulation and that in many cases state regulations effectively prevent new entries into a common carrier field.

22. The Commission is not persuaded by the arguments presented by the NAB that it should alter its decision with

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[17] *See, National Association of Regulatory Utility Commissioners* v. *F.C.C.*, 525 F. 2d 630 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 922 (1976).

respect to regulation of nonbroadcast related teletext service. The rules and policies pertaining to nonbroadcast related teletext were formulated to provide a fair and equitable system for regulating teletext services that are similar to services provided by regular private and common carrier licensees. If, for some reason, the Commission were to modify the regulations applicable to a particular service, then such changes would automatically apply to teletext services operating under the authority of that service.

23. The Commission sees no reason why application of the *NARUC I* test should prove more burdensome to a teletext operator than to an applicant or licensee in some other private or common carrier service. Nor is there reason to believe teletext operators will experience undue or inordinate delays in the initiation of service as a result of the application process for authority to operate as a common carrier.[18]

24. The Commission disagrees with the NAB's argument that common carrier regulation is inconsistent with teletext's ancillary status. In the role of a private or common carrier providing access to teletext transmission facilities, the licensee is responsible for ensuring that its operation conforms to technical operating requirements and the rules applicable to the particular service being provided. The broadcaster would not be expected to monitor or otherwise supervise the content of the teletext transmissions beyond that required by the rules of the service offered. With regard to NAB's contention that common carrier status would contravene Section 3(h) of the Act, that section was intended only to prevent the Commission from imposing common carrier-type regulatory obligation in situations where a licensee is authorized, and wishes, to maintain editorial control over programming transmissions. It does not prevent the Commission from imposing

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[18] Private carrier services require only a letter notifying the Commission prior to initiation of service.

obligations where a licensee elects voluntarily to cooperate as a common carrier rather than retain control over the content of transmissions, as would be the case here. *See generally CBS v. DNC*, 412 U.S. 945 (1973).

25. In summary, the Commission finds that the NAB has not demonstrated any manifest error or omission in the decision with respect to the federal regulatory status and treatment of non-broadcast related teletext activities, nor has it presented any new information on this issue which was not available to it, or the Commission, during the course of the comment and deliberative phases of this proceeding.[19] Accordingly, the Commission will deny the NAB's request to alter its policy towards the federal regulatory status of non-broadcast related teletext.

26. With regard to the preemption issue, the Commission ruled on the NAB's request to preempt state regulation of common carrier teletext services in a *Memorandum Opinion and Order* adopted April 26, 1984 (49 FR 19659) in the FM subcarrier proceeding, BC Docket 82-536.[20] In this decision, the Commission determined that

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[19] We recognize, of course, that the United States Court of Appeals has remanded for further consideration some related aspects of the Commission decisions in the *DBS Report and Order*, 90 F.C.C. 2d 676 (1982) and the *G.T.E. Satellite Corp., 90 F.C.C. 2d 1009 91983). See: National Association of Broadcaster vs. F.C.C.*, 740 F. 2d 1190 (D.C. Cir., 1984); *United States Satellite Broadcasting vs. F.C.C.*, 740 F. 2d 1147 (D.C. Cir., 1984). As discussed above, our legal and policy determinations here rest primarily on the print-related characteristics of the teletext medium, grounds that are independent of the issues addressed in those cases.

[20] The preemption issues raised in the FM subcarrier, teletext, and TV aural subchannel (Docket No. 21323) proceedings were all substantially identical. The Commission therefore chose to resolve the preemption issues in each of these separate proceedings with a single decision. In making this decision, the Commission fully considered all of the comments and other filings that were submitted in each of the three proceedings. *See*, FM Subcarrier *Memorandum Opinion and Order*, *su-*

state regulation that has the effect of prohibiting or impeding entry of common carrier services provided through teletext, FM subcarrier, and TV aural baseband subcarrier facilities frustrates its federal objectives in authorizing these services and making this spectrum available for new uses and therefore should be preempted.[21] The preemption of state authority is limited to regulation that affects entry. In this regard the Commission stated that "other than the preemption of entry regulation, we intend no change in the existing division of regulatory authority between the Commission and the states."[22]

Cable Carriage of Teletext

27. Fourteen parties, primarily representatives of the broadcast industry, request that the Commission reverse its policy on cable carriage of teletext and either require carriage of all teletext or, in the alternative, adopt a "no-strip" rule.[23] The petitioners base their requests largely on the grounds that the Commission misunderstood important facts concerning this issue in relation to technical

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pra, Footnote 6. On reconsideration of the FM Subcarrier *Memorandum Opinion and order, supra*, we concluded that the public had been afforded adequate notice that we might decide to preempt state entry regulation. *See, Memorandum Opinion and Order* in BC Docket No. 82-536, adopted November 8, 1984, FR . We also note that on reconsideration in this proceeding NAB requested that we preempt state regulation. Thus, as in our FM Subcarrier proceeding, interested parties have had an opportunity to address the preemption issue.

[21] FM subcarrier *Memorandum Opinion and Order, supra.*, paragraph 17.

[22] *Id.*, footnote 24.

[23] As as alternative to mandatory carriage rules that require a cable operator to ensure the technical quality of the retransmitted teletext signals, PBS suggests that the Commission adopt a simple "no-strip" rule. It states that this option would resolve the concerns of the cable industry for technical problems, and the expense of plant modifications necessary to overcome them, by not requiring cable systems to take any affirmative action to carry broadcasters' teletext.

matters and that the Commission may not have fully appreciated the effect of its decision on the future of teletext service.

28. Many of the petitioners believe that the Commission based its decision on a concern that retransmission of teletext might pose serious technical problems for some cable systems and that the modifications to technical facilities necessary to overcome these problems would impose significant costs on cable operators. They argue that in fact few, if any, cable systems would have to upgrade their systems to carry teletext. Several proponents of mandatory carriage also disagree with the Commission's position that teletext is not analogous to the kinds of service that have traditionally been accorded mandatory carriage status. In a statement that is expressive of the general consensus of the petitioners, CBS argues that teletext services are enhancements of existing retransmitted broadcast services and as such contain material directed to the needs and interests of all viewers in a broadcaster's service area, especially material such as captioning and superimposed text that is directly related to the accompanying program material.

29. PBDS and Community Telecasters of Southern California (CTSC0 are concerned that if cable systems do not carry teletext, it will result in substantial economic harm to public broadcasting stations. Finally, a number of parties believe that the Commission's decision on the cable carriage issue was influenced by a belief that cable systems would be obligated to retransmit program-related teletext under the requirements of the Copyright Act. The consensus of the petitioners on this point is that copyright protection is not adequate to protect the public interest objectives of the mandatory carriage rules and that the commission should not ignore its responsibility to protect teletext service by deferring to copyright law.

30. Four parties filed oppositions to the requests for reconsideration on the cable carriage issue. On the technical issue, cable operators concede that a modern, well-designed, and properly maintained cable system should have little problem with either on-channel or adjacent-channel interference from teletext transmitted by broadcasters. However, they maintain that there are likely to be situations where some technical problems will occur.

31. Opponents of mandatory carriage argue in support of the position that teletext is not subject to the public interest rules and requirements that have provided the basis for the must carry rules. They also refute petitioners' statements regarding the economic consequences of allowing cable systems to delete broadcasters' teletext and provide examples of situations where retransmitting teletext could pose technical problems. Southern Satellite Systems (SSS) counters broadcaster claims that copyright law is not adequate to protect program-related teletext and believes that these issues can best be resolved through negotiations between the parties.

32. Finally, NCTA submits that those petitioners how propose a simple no-strip rule misunderstand the problem. NCTA states that the usability of a signal, specifically the undesirability of retransmitting a poor signal, is the very reason a cable operator would delete the signal. It argues that any form of mandatory carriage rule could unnecessarily subject a cable operator to service calls and subscriber dissatisfaction and force it to offer an inferior or unusable product.

33. The technical information presented by parties on both sides of the must carry issue establishes that, with some exceptions, most well maintained cable systems would not experience either on-channel or adjacent channel interference in retransmitting teletext signals. The Commission however did not base its decision, as some petitioners believe, on the expectation that retransmission

of teletext would pose serious technical problems for cable systems. While this subject was discussed in the course of the Commission's deliberations, the Commission's primary consideration is whether teletext services merit mandatory carriage protection under the public interest standards that it has traditionally applied in such matters. Upon examination of the petitioners' statements in light of these standards, the Commission concludes that they have not made the requisite showing for grant of their requests either to require carriage of all teletext signals, or alternatively, to adopt a "non-strip" rule for all teletext signals. The petitioners' present no new information or evidence to alter our initial determination that teletext services in general are not analogous to the types of services that have traditionally been accorded must carry status.[24]

34. While we reject the petitioners' request for must carry status for all teletext signals, the Commission is aware of the arguments raised by the petitioners for a limited requirement for carriage of teletext signals such as captioning and text services that are related to the main television program service. The Commission notes that it has recognized a similar distinction between program enhancements and other uses of ancillary facilities in its consideration of must carry protection for TV aural baseband subcarriers. In the *Second Report and Order* in Docket No. 21323, 49 FR 18100, the Commission indicated that it was conscious of the arguments raised by some parties regarding the need for must carry regulation to protect TV aural subcarrier signals used for program-related purposes such as stereophonic sound and second language service.[25] However, the Commission stated that it

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[24] *Report and Order*, para. 88.

[25] In regard to non-program related teletext material, we believe it appropriate to note that the absence of a must-carry obligation should not be read to approve stripping of broadcast teletext signals by cable operators in an instance which would constitute anti-competitive con-

needed additional information before deciding on must carry status for TV aural subcarriers. It therefore issue a second *Further Notice of Proposed Rule Making* in Docket No. 21323 on July 26, 1984 (49 FR 32619) to further examine this one issue.

35. The Commission considers the record in the teletext proceeding to be sufficient to support a decision on must carry status for program-related teletext and thus does not intend to seek additional comment and information from the public on this question. However, in view of the similar natures of the must carry issues for program-related aural subcarriers and teletext, the Commission believes it would be appropriate to resolve both matters at the same time. Accordingly, the Commission is postponing action on the reconsideration of must carry status for teletext that is directly related to normal television service until it takes final action on the must carry issue for program-related TV aural subcarriers.

Effective Date of the Teletext Rules

36. The Commission specified that the teletext rules would be effective upon adoption of the *Report and Order*, rather than the usual effective date of thirty days after the decision is published in the *Federal Register*. There was, however, an error in the *Report and Order* that was released on May 20, 1983, in that the stated effective date of June 27, 1983 did not agree with the discussion in the text, at paragraph 90, that the rules would be made effective upon their adoption. An *Erratum* to correct this mistake and make the effective date March 31, 1983 was issued on June 2, 1983.

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duct. Were an actual case of deliberate anti-competitive conduct to be brought before the Commission, we would consider the appropriate remedies at that time. Our goal is to ensure that the development of teletext technology is not unreasonably inhibited.

37. The Media Access Project (MAP) asserts that the Commission's action on this point violated Section 553(d) of the Administrative Procedures Act (APA), 5 U.S.C. 553(d), and requests it to take appropriate corrective action. MAP argues that the Commission, by issuing the *Erratum,* made the rules effective almost two months prior to their publication. It further states the Commission failed to offer any reasons why any of the exceptions to Section 553(d) should apply.[26]

38. The Commission acknowledges that the error concerning the effective date of the rules was unfortunate and may have produced some degree of confusion and uncertainty for the industry and other parties with an interest in the teletext proceeding. However, in view of the absence of any specific complaints of adversity concerning the effective date of the rules, it appears that this mistake has not resulted in any serious or significant harm to any party.

39. As discussed in paragraph 90 *supra,* and paragraph 90 of the *Report and Order,* the Commission believes that to permit stations to shift their teletext operations to production mode at the time the *Report and Order* was adopted was consistent with furthering the development of services that it found to be in the public interest. Therefore, the Commission holds that this objective constitutes the good cause provided for under exception (3) to Section 553(d). In addition, because the rules authorizing teletext relieve a restriction upon licensees, the 30 day effective

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[26] Section 553(d) of the Administrative Procedures Act states:

"The required publication or service of a substantive rule shall not be made less than 30 days before its effective date, except:
1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
2) interpretative rules and statements of policy; or
3) as otherwise provided by the agency for good cause found and published with the rule.

date provision of the APA is not applicable. *See* U.S.C. 553(d)(1).

40. Accordingly, the Commission concludes that while there were minor procedural discrepancies associated with the effective date of the rules, these mistakes were not significant and no corrective action is warranted.

41. Accordingly, IT IS ORDERED, that the petitions for reconsideration of the *Report and Order* filed by parties named herein ARE GRANTED to the extent indicated above, and ARE DENIED in all other respects. In addition, IT IS ORDERED that Part 73 of the Commission'. Rules ARE AMENDED as set forth in Appendix B, effective March 4, 1985.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Attachments: Appendices A and B

APPENDIX A

Petitioners and Respondents

I. All Participating Parties

Petitioners:

1. Media Access project
2. Henry Geller, Donna A. Lampert, and Philip A. Rubin
3. CBS, Inc.
4. National Broadcasting Company, Inc.
5. WGBH Educational Foundation
6. Post-Newsweek Stations, Inc.
7. National Association of Broadcasters
8. Association of Maximum Service Telecasters
9. Community Television of Southern California
10. CBS Network Television Television Affiliates Association
11. ABC Television Affiliates Association
12. WBNS-TV, Inc.
13. Public Broadcasting Service
14. Midwest Television, Inc.
15. Taft Broadcasting Company
16. University of Wisconsin System

Opposing/Responding Parties

1. California Association of Physically Handicapped, Inc.
2. National Cable Television Association
3. Public Broadcasting Service
4. Southern Satellite Systems, Inc.
5. Time, Incorporated
6. National Association of Broadcasters
7. Joint Opposition of Cable Systems
8. National Captioning Institute
9. Antiope and Telematics Corporation
10. RCA Corporation
11. Satellite Network Delivery Corp.

Replies to Responses:

1. Public Broadcasting Service
2. National Broadcasting Company
3. Association of Maximum Service Telecasters
4. Taft Broadcasting Company
5. National Association of Broadcasters
6. Gary Stanton (late-filed)

II. Participating Parties By Issue

A. Issue: Cable Carriage

Petitioners:

1. Media Access Project
2. CBS, Inc.
3. National Broadcasting Company, Inc.
4. WGBH Educational Foundation
5. Post-Newsweek Stations, Inc.
6. National Association of Broadcasters
7. Association of Maximum Service Telecasters
8. Community Television of Southern California
9. CBS Network Television Affiliates Association
10. ABC Television Affiliates Association
11. WBNS-TV, Inc.
12. Public Broadcasting Service
13. Midwest Television, Inc.
14. Taft Broadcasting Company

Opposing/Responding Parties

1. California Association of Physically Handicapped, Inc.
2. National Cable Television Association
3. Public Broadcasting Service
4. Southern Satellite Systems, Inc.
5. Time, Incorporated
6. Joint Opposition of Cable Systems
7. Antiope and Telematics Corporation

Replying Parties

1. Public Broadcasting Service
2. National Broadcasting Company
3. Association of Maximum Service Telecasters

4. Taft Broadcasting Company
5. National Association of Broadcasters
6. Gary Stanton

B. Issue: Fairness Doctrine and Political Broadcasting Requirements

Petitioners:

1. Media Access Project
2. Henry Geller, Donna A. La Pert, and Philip A. Rubin

Opposing/Replying Parties:

1. National Association of Broadcasters

Replying Parties: None

C. Issue; "For profit" Services By Noncommercial Stations On The Line 21 System Text Channels

Petitioner:

1. University of Wisconsin System

Opposing/Responding Parties:

1. Public Broadcasting System
2. National Captioning Institute

Replying Parties: None

D. Issue; Regulatory Status Of Non-broadcast Teletext Services

Petitioner:

1. National Association of Broadcasters

Opposing/Responding Parties: None

Replying Parties: None

E. Issue: Definition of Teletext

Petitioners:

1. Henry Geller, Donna A. Lampert, and Phillip A. Rubin
2. national Association of Roadcasters
3. Public Broadcasting System
4. University of Wisconsin System

Opposing/Responding Parties:

1. Southern Satellite Systems, Inc.
2. Antiope and Telematics Corporation
3. Satellite Network Delivery Corporation

F. Issue: Effective Date of The Rules

Petitioner:

1. Media Access Projects

Opposing/Responding Parties: None

Replying Parties: None

APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF CCOLUMBIA CIRCUIT

No. 85-1160 September Term, 1986

Telecommunications Research and Action Center and Media Access Projects

v.

Federal Communications Commission and United States of America

FILED Dec 16, 1986

BEFORE: BORK, Circuit Judge and MACKINNON, Senior Circuit Judge

ORDER

Upon consideration of petitioners' petition for rehearing, it is ORDERED, by the Court that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Chief Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1160 September Term, 1986

Telecommunications Research and Action Center and Media Access Project,

Petitioners,

v.

Federal Communications Commission and the United States of America,

Respondents,

National Association of Broadcasters, Public Broadcasting Service, American Newspaper Publishers Association,

Intervenors.

FILED DEC 16, 1985

Before: BORK, Circuit Judge.

ORDER

It is ORDERED, by the Court, *sua sponte,* that the Statement filed by Circuit Judge Bork on December 16, 1986 be, and hereby is, amended as follows:

page 2, line 1, delete the word "issue" and insert in lieu thereof the word "issues".

Per Curiam

For The Court

/s/ GEORGE A. FISHER
GEORGE A. FISHER
Clerk

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1160

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER and MEDIA ACCESS PROJECT, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF BROADCASTERS, PUBLIC BROADCASTING SERVICE, AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, INTERVENORS

Petition for Review of an Order of the Federal Communications Commission

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On Petitioners' Suggestion for Rehearing En Banc

Filed December 16, 1986

Andrew Jay Schwartzman, Henry Geller and *Donna Lampert* were on petitioners' suggestion for rehearing *en banc.*

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, *Circuit Judges.*

ORDER

Petitioners' suggestion for rehearing *en banc* has been transmitted to the full Court. The taking of a vote was requested. A majority of the judges of the Court in regular active service have not voted in favor of the suggestion. Accordingly, it is

ORDERED, by the Court *en banc,* that the suggestion is denied.

Per Curiam

Chief Judge Wald and Circuit Judge D. H. Ginsburg did not participate in this order.

Circuit Judges Robinson, Mikva, Edwards, Ruth B. Ginsburg and Starr would grant the suggestion for rehearing *en banc.*

A statement of Circuit Judge Mikva, joined by Circuit Judge Edwards, is attached.

A statement of Circuit Judge Starr, joined by Circuit Judges Robinson and Ruth B. Ginsburg, is attached.

A statement of Circuit Judge Bork is also attached.

MIKVA, *Circuit Judge, with whom Circuit Judge* EDWARDS *joins, dissenting from the denial of rehearing en banc*: In the panel decision, the majority held that the fairness doctrine is not a "binding statutory obligation" under the Communications Act of 1934, 47 U.S.C. § 315(a) (1982) (the Act), and therefore found that the Federal Communications Commission (the Commission) is not precluded from altering the fairness obligation in the case of teletext broadcasting. *Telecommunications Research and Action Center and Media Access Project v. FCC*, No. 85-1160, slip op. at 34 (D.C. Cir. Sept. 19, 1986). This holding is flatly wrong. In amending the Act in 1959, Congress not only "recognized and preserved" "an administrative construction," *see id.* at 35, it explicitly approved of, ratified and codified the fairness doctrine. The majority's conclusion to the contrary flies in the face of the legislative history of section 315 and interpretations of that provision by the Supreme Court as well as this court. I therefore dissent from the decision of this court to deny rehearing *en banc*.

Section 315 warned broadcasters and the Commission that the new bill's equal time exemptions did not disturb the Commission's fairness doctrine requirements. The clear import of the amendment's language and legislative history was that the bill's drafters understood the Act to already require the fairness doctrine under the Act's public interest standard. Section 315 merely reaffirmed what was already the law.

The Report that accompanied the 1959 bill as it first emerged from Senate Hearings declared that the proposed changes to the Act would not affect "[Commission] policy or existing law which holds that a licensee's *statutory obligation* to serve the public interest is to include [the duty to present] a fair cross section of opinion." Hearings on Political Broadcasting before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. at 13

(1959) (emphasis added). Senator Proxmire, not satisfied with having the declaration buried in the Report, amended the bill on the floor to refer specifically to the fairness doctrine:

> but nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible.

105 Cong. Rec. 14457 (1959).

There is no doubt that Senator Proxmire referred to a "binding statutory obligation," not to a requirement imposed by the Commission pursuant to its authority under the Act. His amendment deals with "interpretation of the Communications Act itself." *Id.* at 14462 (Sen. Hartke). It states "a requirement that broadcasters shall live and shall abide by the rule of fairness." *Id.* ("I understand the amendment to be a statement or codification of the standards of fairness. I understand that the Commission is now obliged by existing law and policy to abide by the standard of fairness.") (Sen. Pastore, Chairman of the Subcommittee).

The bill as reported from the House-Senate Conference modified the Senate version slightly to read essentially as section 315 does today. According to the Conference Report, the change in the Proxmire amendment was merely cosmetic *Id.* at 17777; *see also* 105 Cong. Rec. 17831 (1959) ("We have maintained very carefully the spirit of the Proxmire amendment.") (Sen. Scott, Senate conferee). Indeed, the legislative history again evinces a recognition that the fairness principle is em-

bodied in the Act itself. The Conference Report interpreted the provision as "a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under [the Act]." H. Rep. No. 1069, 86th Cong., 1st Sess. at 5 (1959). In the words of Congressman Harris, Chairman of the House Committee that reported the bill, Section 315 "reaffirmed the 'standard of fairness' established under the [Act]." *Id.* at 17778.

The drafters insisted on retaining the Proxmire amendment, "if with some slight modifications," "to be a continuing reminder and admonition to the [Commission] and to the broadcasters alike, that [Congress was] not abandoning the philosophy that gave birth to section 315, in giving people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." *Id.* at 17830 (Sen. Pastore).

The Supreme Court has expressed a similar understanding of the 1959 amendment. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court upheld the fairness doctrine against constitutional challenge. In discussing the statutory basis for the doctrine, the Court stated that the "language makes it very plain that Congress, in 1959, announced that the phrase 'public interest,' which had been in the Act since 1927 imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment . . . inhered in the public interest standard." 395 U.S. at 380. The Court went on to explain that Congress "ratified" the Commission's fairness doctrine construction of the public interest standard "with positive legislation." *Id.* at 381-82; *see also id.* at 383-84 (discussing the legislative history of the amendment).

Post-*Red Lion* cases reinforce the interpretation of the amendment as having codified and therefore as mandating the doctrine. In 1973, the Court observed that in the

Act "Congress has imposed on all broadcast licensees" "an affirmative and independent statutory obligation to provide full and fair coverage of public issues." *CBS v. Democratic National Committee*, 412 U.S. 94, 129-30 (1973); *see also id.* at 110 n.8 ("Congress amended § 315 of the Act to give statutory approval to the Fairness Doctrine."); *id.* at 113 n.12 (same). Most recently, the Court declared that it was "not prepared to reconsider [its] long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC v. League of Women Voters of California*, 92 L. Ed. 278, 289 n.11, 104 S. Ct. 3106, 3117 n.11 (1984).

This court has repeatedly considered the fairness doctrine as part of the statutory framework of the Act. As Judge Robinson explained for the court, "[the] language placed in Section 315(a) in 1959 . . . codifies the fairness doctrine formulated by the Commission in 1949." *Kennedy for President Committee v. FCC*, 636 F.2d 432, 438 (D.C. Cir. 1980) (citing *Red Lion*, 395 U.S. at 377-78). The doctrine, which "originally evolved under the authority of general provisions of the [Act] calling for regulation in the 'public interest,' . . . has since received explicit statutory recognition, in the 1959 amendment." *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1007 n.11 (D.C. Cir. 1976) (Wright, J., for a unanimous court); *see also Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 296 n.34 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

With the exception of a few recent expressions of doubt by individual Commissioners, the Commission's position has consistently been that with the 1959 amendment, Congress specifically ordained the fairness doctrine as a statutory requirement. *See, e.g.*, Applicability of the

Fairness Doctrine in the Handling of Controversial Issues of Public Importance, Appendix B, "The History of the Fairness Doctrine," 29 Fed. Reg. 10425 (1964); Letter to Senator Proxmire, 400 FCC 2d 1238 (1973). For example, in a letter to Congressman Harris, the Commission stated that "since 1959 the [Act] imposes the specific obligation of fairness upon a broadcast licensee. . . . In short, there is a specific statutory obligation . . . to be fair in treating controversial issues." Honorable Oren Harris, 40 FCC 582, 583 (1963). Significantly, after thoroughly canvassing the Act and its history, the Commission recently declined to conclude that "it had the authority without further Congressional action to eliminate the fairness doctrine." Commission Brief at 31 n.20 (citing FCC News Rept. No. DC-185 (Aug. 7, 1985)). In responding to the petition for review in this case, the Commission never argued that the fairness doctrine was *not* statutorily mandated. That argument is a construct of the majority of the panel who heard the case.

The primacy of Congress as policy-maker should not be blunted or eviscerated by courts which find either the policy or the policy-makers in error. When Congress ratifies an administrative determination it converts an agency decision into positive, affirmative law. While such a conversion ought not be lightly inferred, neither should it be arrogantly disregarded when the history is as clear as it is here. In the 1959 amendment the Commission is not simply authorized to impose the fairness doctrine, it is compelled to do so. The doctrine has been encapsulated by Section 315 of the Act and the courts overreach to undo it.

STARR, *Circuit Judge, with whom Circuit Judges Robinson and Ruth B. Ginsburg join, dissenting from the denial of rehearing en banc*: We agree that the issue discussed in Judge Mikva's dissenting statement is an important one meriting careful consideration by our court *en banc*. For that reason, and without prejudging the question, we would grant the suggestion for rehearing *en banc*.

BORK, *Circuit Judge*: The panel opinion in this case held that the fairness doctrine evolved by the Federal Communications Commission is a Commission policy and is not embodied in statutory law. The dissent from the full court's denial of a petition for rehearing *en banc* contends that the doctrine has been enacted. Though I will not repeat the analysis of the panel opinion, I respond to the dissent in order to show that there are additional factors that compel the panel's result. That Congress merely ratified the Commission's position that the fairness doctrine is a valid exercise of delegated authority is shown by the clear import of the language of the 1959 amendment, the Supreme Court's reading of the statute and its legislative history, and the growth of the doctrine itself.

A.

The dissent's claim that Congress codified the Commission's fairness doctrine and made it a statutory obligation rests, most improbably, upon the language of a disclaimer within a proviso to the 1959 amendment to the Communications Act of 1934. Had Congress affirmatively intended to make the fairness doctrine a statutory command, it surely would have employed a more direct and less offhanded approach than that.

In section 315(a) Congress provided that a broadcast licensee who allows a political candidate to use its station must give equal opportunities to all other candidates for the same office. This is followed by a proviso, the third sentence of which states that appearance by a candidate on various bona fide news programs shall not be considered a use of the station. The fourth sentence of the proviso is the disclaimer at issue here: "Nothing in the foregoing sentence [about news programs] shall be construed as relieving broadcasters, in connection with the presentation of [such news programs] from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity

for the discussion of conflicting views on issue of public importance." 47 U.S.C. § 315(a) (1982).

The dissent claims that this disclaimer enacts the fairness doctrine as a statute the Commission is now powerless to change. But the language cannot be read that way. The disclaimer refers to an obligation imposed "under this chapter." No one claims that in 1959 Congress imposed such an obligation elsewhere in the chapter. The statute obviously refers to an obligation previously imposed. As will be shown, however, it is quite clear that Congress had not previously enacted the fairness doctrine. The only alternative is that the reference is to an obligation previously imposed by the Commission "under this chapter." The disclaimer then states that the preceding sentence is not to be construed as relieving broadcasters of the Commission's fairness doctrine.

It is plain, therefore, that in the 1959 amendment Congress was disclaiming any intent to dismantle the Commission's fairness policy. The previous sentence exempting appearances of candidates on news programs from the definition of "use" might have been so misconstrued. The most that Congress can be said to have ratified was the Commission's authority to frame a fairness doctrine under the "public interest" language of the Act.

B.

Many of the remarks culled from the legislative history by the dissent are either ambiguous on the question before us or are read most easily as mere approvals of the Commission's exercise of its delegated authority. In any event, that same legislative history was canvassed by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Since the dissent makes much of that case, I will examine it in some detail to show that it is contrary to the dissent's position. I discuss first the passages upon which the dissent relies. After quoting the text of the disclaimer at issue here, the Court stated:

> This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.

Id. at 380-81 (footnote omitted). This passage may, upon a casual reading, be taken in either of two ways. It may be taken as saying that the fairness doctrine was enacted by Congress in 1927. Or it may be read to say that the public interest concept enacted in 1927 gave the Commission the power to create the fairness doctrine. The one thing the passage most emphatically does not do is lend support to the dissent's theory that the fairness doctrine was enacted by the 1959 legislation. That idea appears nowhere except in the dissent.

Both before and after the passage cited, the *Red Lion* opinion repeatedly speaks in ways that show the 1959 disclaimer merely approved the Commission's prior exercise of delegated discretion. Thus:

> The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

395 U.S. at 380. The first clause of that sentence refers to the 1959 amendment and claims only that it embodies "recognition" of the fairness doctrine. The second clause refers to the fact that the Commission modeled the doctrine on statutory provisions that did not enact the doctrine but provided parallels. The third clause claims no more than approval of the doctrine in legislative history. This is not the language of mandatory direction but of authorization.

The dissent relies upon the Court's statement that Congress "ratified" the fairness doctrine "with positive legislation." A quotation of the full passage shows, however, that the Court's statement unequivocally supports the panel opinion in this case, not the dissent. In finding it significant that Congress had refused to alter the Commission's construction, *Red Lion* stated:

> Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce *the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations* . . . .

395 U.S. at 381-82 (emphasis added; footnotes omitted). A Commission that is "authorized" and "free" to do things is not directed to do them.

Again, *Red Lion* states that Senator Proxmire's amendment "constituted a positive statement of doctrine and was altered to *the present merely approving language* in the conference committee." 395 U.S. at 383-84 (emphasis added; footnote omitted). The Court concluded that "the fairness doctrine and its component personal attack and political editorializing regulations are *a legitimate exercise of congressionally delegated authority*," *id.* at 385 (emphasis added), and "[w]e cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in RTNDA, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves 'the public interest.'" *Id.* at 386.

The dissent's reliance on two post-*Red Lion* cases is curious, for they cut against the dissent's argument.

In *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973), the Court made a sharp distinction between Congress' treatment of air time for political candidates and its treatment of the fairness doctrine. The Court noted that the enactment of section 312(a) "essentially *codified* the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates," 412 U.S. at 113-14 n.12 (emphasis added), but concluded only that the fairness doctrine had received "statutory approval." *Id.* In *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984), the Court, in the passage cited by the dissent, was addressing the issue of whether the "scarcity" rationale should be reconsidered, *id.* at 376 n.11, and not whether the fairness doctrine had been codified. In the next footnote, however, the Court did directly address the question before us and rebutted the dissent's position here.

> We note that the FCC, observing that "[i]f any substantial possibility exists that the [fairness doctrine] rules have impeded rather than furthered, First Amendment objectives, repeal may be warranted on that ground alone," has tentatively concluded that the rules, by effectively chilling speech, do not serve the public interest, and has therefore proposed to repeal them. Notice of Proposed Rulemaking In re Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed. Reg. 28298, 28301 (1983). *Of course, the Commission may, in the exercise of its discretion, decide to modify or abandon these rules, and we express no view on the legality of either course.*

Id. at 378 n.12 (emphasis added).

C.

Quite aside from the legislative history discussed and summarized by the Supreme Court in *Red Lion*, there are other aspects of that history and of the growth of the

fairness doctrine that preclude any notion that in 1927 Congress enacted the fairness doctrine. In the 1927 Act, Congress specifically adopted a provision requiring that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates." H.R. Rep. No. 1886, 69th Cong., 2d Sess. 10 (1927). Thus, Congress knew how to write language requiring "equal opportunities." It wrote nothing that embodied a broader fairness doctrine. Second, Congress rejected proposals to include a similar requirement regarding the discussion of public issues or questions. *See* 67 Cong. Rec. 5560-61 (1926); S. Rep. No. 772, 69th Cong., 1st Sess. 4 (1926). In other words, Congress specifically rejected proposals to include the fairness doctrine in the 1927 Act. In addition, two other attempts to write the fairness doctrine into statutory law failed. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934) (proposing language requiring equality of treatment for opposing views on "public question[s]"); H.R. Rep. No. 2106, 72d Cong., 2d Sess. 4 (1933) (adopting language in a bill passed by Congress but pocket-vetoed by the President requiring "equal opportunity for the presentation of both sides of public questions").

The foregoing demonstrates that the fairness doctrine was not enacted in 1927 and hence no such enactment could have been ratified in 1959. But the dissent actually appears to think the fairness doctrine was enacted for the first time in 1959. Aside from the fact that the language of the disclaimer and the Supreme Court's three discussions of it refute that idea, there is the fact that such a theory supposes a drastic step was taken without discussion. From the beginning, as the courts have repeatedly recognized, *Red Lion*, 395 U.S. at 380; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), the Commission has been accorded broad

and supple power to evolve rules and regulations to serve "the public interest." That flexibility is, and has been, the central feature of the Commission's authority. It would have been extraordinary if Congress in 1959 had intended to strip the Commission of all further discretion in this area and to freeze by statute the fairness doctrine in the form it had in 1959. That removal of discretion would have been particularly bold because, contrary to all past practice, Congress "would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding." *National Broadcasting Co.*, 319 U.S. at 219. One would have expected extended congressional discussion of the wisdom of such a move. There is none.

* * * *

The distinction between a statement that a policy is mandated and a statement that it is authorized is crucial, but it is a distinction the dissent systematically overlooks. There is every indication that Congress ratified the Commission's authority to evolve the fairness doctrine under the Act's public interest standard. But there is also every indication that Congress went no further. It did not legislate that, having created the fairness doctrine, the Commission was henceforward required to keep it and apply it as it stood in 1959.

The dissent is quite correct in saying that "[t]he primacy of Congress as policy-maker should not be blunted or eviscerated by courts which find either the policy or the policy-makers in error." Dissent at 5. That is precisely the reason we should not impute to Congress a statute that it never debated or enacted.

APPENDIX F

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1160 September Term, 1986

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER
and MEDIA ACCESS PROJECT,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Respondents,

NATIONAL ASSOCIATION OF BROADCASTERS,
PUBLIC BROADCASTING SERVICE,
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Intervenors.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

Before: BORK and SCALIA, Circuit Judges, and MacKINNON, Senior Circuit Judge.

FILED SEP 19, 1986

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Communications Commission, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the order of the Federal Communications Commission under review herein is hereby reversed in part and affirmed in part, and this case is remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: September 19, 1986

Opinion for the Court filed by Circuit Judge Bork.

Opinion concurring in part and dissenting in part filed by Senior Circuit Judge MacKinnon.

Supreme Court, U.S.
FILED
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No. 86-1371

In the Supreme Court of the United States

OCTOBER TERM, 1986

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER AND MEDIA ACCESS PROJECT, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission exceeded its authority under the Communications Act of 1934 by holding that broadcast licensees' teletext services are not subject to the requirements of the fairness doctrine.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Columbia Broadcasting System Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 3

Commercial TV Stations, 98 F.C.C.2d 1076 (1984), petition for review pending *sub nom. Action for Children's Television* v. *FCC*, No. 86-1425 (D.C. Cir. filed July 25, 1986) 14

FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 9

Fairness Doctrine Report, 102 F.C.C.2d 143 (1985), petition for review pending *sub nom. Radio-Television News Directors Ass'n* v. *FCC*, No. 85-1691 (D.C. Cir. filed Oct. 22, 1985) 8, 11, 14

Lar Daly, 26 F.C.C. 715 (1959) 11

Meredith Corp. v. *FCC*, 809 F.2d 863 (D.C. Cir. 1987) ... 14

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 9

Public Interest Research Group v. *FCC*, 522 F.2d 1060 (1st Cir. 1975), cert. denied, 424 U.S. 965 (1976) 8, 10

Radio Deregulation, 84 F.C.C.2d 968, on reconsideration, 87 F.C.C.2d 797 (1981), aff'd in relevant part, *Office of Communication* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983) 13

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 3, 9, 12

Constitution, statutes and regulation:

U.S. Const. Amend. I 12, 15

Federal Communications Act of 1934, 47 U.S.C. 151 *et seq.*:

47 U.S.C. 151 4

47 U.S.C. 303(g) 4

Statutes and regulation – Continued: Page

47 U.S.C. 312(a)(7) 5, 7
47 U.S.C. 315 5
47 U.S.C. 315(a) 5, 9
47 C.F.R. 73.1910 3

Miscellaneous:

133 Cong. Rec. S5218-S5232 (daily ed. Apr. 21, 1987) ... 15
133 Cong. Rec. D634 (daily ed. May 7, 1987) 15
H.R. 1934, 100th Cong., 1st Sess. (1987) 15
S. Rep. 562, 86th Cong., 1st Sess. (1959) 12
Syracuse Peace Council, 52 Fed. Reg. 2805 (1987) 15

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 801 F.2d 501. The order denying the petition for rehearing (Pet. App. 135a) is not reported. The order denying the suggestion for rehearing en banc (Pet. App. 137a-151a) is reported at 806 F.2d 1115. The orders of the Federal Communications Commission (Pet. App. 39a-134a) are reported at 48 Fed. Reg. 27054 (1983) (Report and Order) and 101 F.C.C.2d 827 (Order on Reconsideration).

JURISDICTION

The judgment of the court of appeals (Pet. App. 152a) was entered on September 19, 1986. A petition for rehearing was denied on December 16, 1986 (Pet. App. 135a). The petition for a writ of certiorari was filed on February 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. As a result of recent technological advances, television broadcasters are now able to transmit text and graphic material in a previously unused portion of an ordinary television broadcast signal.[1] This textual transmission, which has come to be known as "teletext," can be received by television sets equipped with appropriate decoding equipment. Examples of potential teletext transmission services include news, weather reports, comparative shopping prices, and entertainment schedules. Pet. App. 3a-4a, 39a-40a & n.2; see also *id.* at 60a (footnote omitted) (defining a teletext service as "a data system for the transmission of textual and graphic information intended for display on viewing screens" and the transmission of "data that is useful to widen and enhance the utility and service of teletext information [such as codes that relate to the method by which information is displayed on viewing screens], even though this latter data is not necessarily intended for display").

In the fall of 1981, the Federal Communications Commission issued a notice of proposed rulemaking seeking comments addressing the terms upon which television broadcasters should be permitted to provide teletext services. After considering the comments filed by interested members of the public, the Commission adopted rules "authoriz[ing] licensees of both full service and low power television stations: (1) to operate teletext services and (2) to choose both the kinds of service to offer and the technical systems for transmitting the data signals" (Pet.

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[1] This material is transmitted in the vertical blanking interval of the video portion of the television signal. (The vertical blanking interval is that portion of the television signal that appears as a black bar when the picture rolls.) Pet. App. 39a & n.1. Thus, a television broadcaster may transmit both regular programming and textual material on a single signal.

App. 58a-59a (footnote omitted)). The Commission adopted an "open regulatory approach," declining to prescribe the method broadcasters should utilize in operating teletext services, because of the wide variety of potential uses of teletext, the likelihood that user demand will require different types of services, and the probability that the pattern of demand will shift over time (*id.* at 62a-64a).

The Commission concluded that "the Fairness Doctrine should not be applied to teletext services" (Pet. App. 69a).[2] The Commission observed that Congress in 1959 "added language [to the Communications Act of 1934] recognizing the Commission's Fairness Doctrine policy" (Pet. App. 67a (footnote omitted)). The Commission stated, however, that "Congress' purpose in adding this language was solely to ratify the Commission's then-existing policy concerning application of the Fairness Doctrine to news broadcasts"; in the Commission's view, "Congress did not require nor prohibit possible extensions of that policy in the future" (*id.* at 67a-68a). Thus, "any determination concerning this question is one which has been entrusted to [the Commission's] sound judgment and discretion in the first instance" (*id.* at 68a).[3]

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[2] The fairness doctrine provides that "broadcasters have certain obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (47 C.F.R. 73.1910). It thus imposes two separate obligations upon a broadcast licensee: the licensee must (1) provide coverage of controversial issues of public importance in the communities that it serves, and (2) provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 110-111 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 377-378 (1969).

[3] The Commission further noted that even if the 1959 amendment did "incorporate the Fairness Doctrine as a statutory requirement," the Commission retained discretion to determine whether the doctrine

The Commission found that application of the fairness doctrine in the teletext context was inappropriate for several reasons. It first observed that "it seems probable that teletext—a textual means of communication primarily not employing sound and pictures—more closely resembles, and will largely compete with, other print communication media such as newspapers and magazines" (Pet. App. 69a). "In this arena of competition, which includes all other sources of print material to which the public has access," the Commission was "not persuaded that [teletext] must be accorded special First Amendment treatment in order to protect the public's right of access to conflicting views on issues of public importance." *Ibid.*; see also *id.* at 118a (order on reconsideration).

The Commission also stated that its determination was justified by the policy favoring the development of new communications services (see 47 U.S.C. 151, 303(g)). It noted that teletext could be used "to provide an alternative method for the delivery of newspapers and other print media to consumers," but that "many commenters [had] questioned whether such services would ever be economically viable if licensees are burdened with Fairness Doctrine obligations" (Pet. App. 70a). Finding that "the likelihood of licensees' embarking upon these types of endeavors will be substantially affected" by the decision whether to apply the Fairness Doctrine, the Commission declined to "block from the outset full development of this promising new service by the unreflective application of requirements that appear fundamentally unsuitable and which are not legally required" (*ibid.*). It noted that "[s]uch a course would be inconsistent with [its] statutory responsibility to promulgate policies that are responsive to

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should apply to teletext services because "regardless of how Congress' action is characterized, it seems clear that novel services such as teletext were beyond its scope" (Pet. App. 68a n.24).

the characteristics of new communications services so as to encourage, not frustrate, their development" (*ibid.*). For that reason, the Commission concluded that "the public interest is better served by not subjecting teletext to Fairness Doctrine obligations" (*ibid.*).[4]

2. The court of appeals affirmed the Commission's decision in pertinent part by a divided vote, holding that the Commission did not exceed its authority by declining to apply the fairness doctrine to teletext services (Pet. App. 1a-38a). The court first rejected petitioners' argument that the 1959 amendment to the Communications Act codified the fairness doctrine, thereby eliminating the Commission's discretion to determine whether the application of the doctrine in a particular context is consistent with the public interest. The court held that the amendment simply "ratified the Commission's longstanding position that the public interest standard authorizes the fairness doctrine. The language, by its plain import, neither creates nor imposes any obligation, but seeks to make it clear that the statutory amendment does not affect the fairness doctrine obligation as the Commission had

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[4] The Commission also determined that the statutory requirement that licensees "allow reasonable access * * * for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy" (47 U.S.C. 312(a)(7)) could be satisfied by providing access to conventional broadcast operations; the Commission stated that Section 312(a)(7) does not require licensees in addition to afford candidates access to teletext services (Pet. App. 65a-66a). Finally, the Commission discussed the application in the teletext context of Section 315 of the Communications Act, which provides that when a licensee permits one candidate for public office to use a broadcasting station he must afford "equal opportunities" to all other candidates for that office (47 U.S.C. 315(a)). It stated that "because of the fundamental dissimilarity between teletext and the types of broadcast 'uses' envisioned by Congress in Section 315, * * * the equal opportunities requirement need not be applied to teletext services" (Pet. App. 67a).

previously applied it" (Pet. App. 34a). The court stated that "the obligation recognized and preserved [by the 1959 amendment] was an administrative construction, not a binding statutory directive"; it found that the language of the amendment suggested "that Congress viewed the doctrine as an obligation promulgated pursuant to authority conferred under the Act, specifically, the public interest mandate, and not as a fixed requirement frozen in place by the Act" (*id.* at 35a).

Although the Commission for the foregoing reasons was not bound "to adhere to a view of the fairness doctrine that covers teletext," the court stated that, to the extent the Commission's decision amounted to "a change in its view of what the public interest requires * * *, the Commission has an obligation to acknowledge and justify that change in order to satisfy the demands of reasoned decisionmaking" (Pet. App. 35a). The court found that the Commission acted rationally in concluding that application of the fairness doctrine was inappropriate because "the burdens of applying the fairness doctrine might well impede the development of the new technology" (*id.* at 36a). The court observed that "[i]n effect, the Commission posited an absence of fairness doctrine burdens and made predictions about the marginal encouragement to the development of teletext and the marginal diminution, if any, in the presentation of opposing viewpoints on controversial matters of public importance. In weighing the public interest implications of the two marginal effects, the Commission concluded that the balance favored forbearance from applying the fairness doctrine" (*id.* at 36a-37a). Because there was no evidence that the Commission's conclusion was arbitrary and capricious, the court of appeals affirmed the Commission's determination.[5]

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[5] The court also upheld the Commission's determination that the "reasonable access" requirement imposed by Section 312(a)(7) of the Act does not separately apply to teletext services (Pet. App. 18a-25a). It reversed and remanded the Commission's action insofar as the

ARGUMENT

Viewed in the abstract, the question whether Congress has mandated the imposition of the fairness doctrine with respect to all broadcast services, and thereby deprived the Federal Communications Commission of its discretion to determine if the public interest would be served by applying the requirements of the doctrine to a particular broadcast service, is a matter of some importance. This Court does not decide abstract issues of law, however; it reviews judgments in particular cases. And we think it clear that, in view of the circumstances surrounding this case, review by this Court of the judgment below is not warranted.

First, petitioners' greatly exaggerated claims regarding the practical effect of the decision below (see Pet. 9-11) cannot obscure the fact that the Commission's decision is in fact quite narrow, applying only to teletext, a broadcast service that is still in its infancy and that has an uncertain future. The Commission did *not* take any action to exempt conventional broadcast activities from the requirements of the fairness doctrine; indeed, the Commission expressly reaffirmed its intention to enforce those requirements unless they are eliminated pursuant to further action by the Commission or some other competent authority. The

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Commission had held that the "equal opportunities" requirement imposed by Section 315 of the Act did not apply to teletext transmissions (Pet. App. 25a-31a).

Judge MacKinnon dissented with respect to both the Section 312(a)(7) and fairness doctrine issues (Pet. App. 38a). The full court of appeals denied a suggestion for rehearing en banc (*id.* at 138a). Two judges dissented from the denial of rehearing en banc on the ground that the panel had erred by upholding the Commission's determination that it had the authority to decline to extend the fairness doctrine to teletext services (*id.* at 139a-143a). Three judges stated that they had voted to grant the suggestion for rehearing en banc because the fairness doctrine issue was important, but expressed no view regarding the correctness of the panel determination (*id.* at 144a).

limited practical effect of the Commission's ruling is a factor weighing strongly against review by this Court.

Second, Congress—in response to the Commission's action in this and related proceedings—is at the present time actively considering legislation concerning the status of the fairness doctrine. That legislation would resolve the precise legal issue presented in this case by enacting into law the requirements of the fairness doctrine. In view of the pendency of the matter before Congress, this Court should stay its hand at this time. If the issue presented here is not resolved by Congress, the Court will be able to consider the matter in the event it arises in connection with future regulatory proceedings.

1. The Commission has recognized that there is no easy answer to the question whether Congress has enacted the fairness doctrine as positive law or simply approved the doctrine as a permissible exercise of the Commission's authority to regulate broadcasters in the public interest. See *Fairness Doctrine Report,* 102 F.C.C.2d 143, 227-246 (1985), petition for review pending *sub nom. Radio-Television News Directors Ass'n* v. *FCC,* No. 85-1691 (D.C. Cir. filed Oct. 22, 1985). After a careful review of the matter, both the Commission and the court of appeals concluded in this case that Congress has not eliminated the Commission's authority to shape the fairness doctrine to fit both the changing characteristics of the broadcast industry and the Commission's evolving view of the public interest. We submit that their conclusion is correct. Indeed, the only other court of appeals that has considered the question has reached the same result. *Public Interest Research Group* v. *FCC,* 522 F.2d 1060, 1066-1067 (1st Cir. 1975), cert. denied, 424 U.S. 965 (1976).[6]

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[6] Petitioners' assertion (Pet. 12) that the Court should consider summary reversal in this case is wholly inappropriate in view of the absence of settled authority governing the question presented in the petition. Indeed, petitioners' claim (Pet. 13) that the Court's decision

Section 315(a) of the Communications Act of 1934, 47 U.S.C. 315(a), states that a licensee who permits a candidate for public office to use a broadcasting station must "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." Section 315(a) was amended by Congress in 1959 to provide that this "equal opportunities" requirement is not triggered by appearances by a candidate on a bona fide newscast, news interview, news documentary, or on-the-spot coverage of news events. The 1959 amendment went on to state (*ibid.*):

> Nothing in the [portion of the statute creating the exemption for news coverage] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

This Court repeatedly has recognized that Congress granted the FCC broad discretion to determine the contours of "the public interest" in the context of the broadcast industry. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 379-380 (1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). As Judge Bork recognized, "[i]t would have been extraordinary if Congress in 1959 had intended to strip the Commission of all further discretion in this area and to freeze by statute

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in *Red Lion Broadcasting Co.* v *FCC*, 395 U.S. 367 (1969), controls this case is somewhat surprising in view of the statements in the Court's opinion that support the decision of the court below (see page 12, *infra*).

the fairness doctrine in the form it had in 1959. * * * One would have expected extended congressional discussion of the wisdom of such a move. There is none" (Pet. App. 151a).

The structure and language of the 1959 amendment is wholly inconsistent with the notion that Congress imposed upon broadcasters a separate, statutory obligation to comply with the fairness doctrine. The language of the amendment relating to the fairness doctrine does not in terms announce such a requirement. And the fact that this language appears in a disclaimer to the newly-established exemption from the "equal opportunities" requirement strongly supports the conclusion that it was designed simply "to make it clear that the statutory amendment [creating the exemption] does not affect the fairness doctrine obligation as the Commission had previously applied it" (Pet. App. 34a).

Moreover, the portion of the provision discussing broadcasters' fairness "obligation" does not describe that obligation in affirmative terms, but instead characterizes it as an "obligation imposed upon [broadcasters] under th[e] Act." The provision thus indicates that some *other* source of law, such as the Commission's rules and decisions, is the source of the fairness obligation. See Pet. App. 146a (statement of Bork, J., on denial of rehearing en banc). The statutory language accordingly provides ample basis for the court of appeals' conclusion that "Congress viewed the doctrine as an obligation promulgated pursuant to authority conferred under the Act, specifically, the public interest mandate, and not as a fixed requirement frozen in place by the Act." *Id.* at 35a; see also *Public Interest Research Group* v. *FCC*, 522 F.2d at 1066.[7]

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[7] Petitioners' sole argument in support of their contrary interpretation of the language of the statute (Pet. 13) is that, because the statute refers to both the obligation to operate in the public interest and the fairness doctrine as obligations imposed "under this Act," the statute

The legislative history of the 1959 amendment provides little support for petitioners' contrary interpretation of the statute. The purpose of the amendment was to overturn the Commission's decision in *Lar Daly*, 26 F.C.C. 715 (1959), which held that the equal opportunities requirement of Section 315 was triggered by the appearance of a political candidate on a newscast. The Commission has observed that "the legislative history lacks clear record evidence demonstrating a reasoned consideration of the fairness doctrine which would indicate an intent by Congress to codify the doctrine. While there do exist scattered references to the obligations of broadcasters under the public interest standard to present both sides of controversial public issues by some members of Congress, there was no significant discussion of the Commission's fairness doctrine." *Fairness Doctrine Report*, 102 F.C.C.2d at 235; see generally *id.* at 234-240.[8]

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must mean that the fairness doctrine, like the public interest standard, is embodied in the Communications Act itself. But Congress could just as reasonably have used the term "under" to refer to the *statutory* obligation to operate in the public interest and the *administrative* decisions embodying the fairness doctrine: both obligations are imposed "under" the statute although they flow from different sources. See also Pet. App. 35a. Petitioners do not even attempt to explain why Congress would have used this quite obscure language—tucked into a disclaimer designed principally to avoid any unintended legislative alteration of existing rules—to impose a significant limitation upon the Commission's discretion to determine the public interest. See *id.* at 145a, 150a-151a.

[8] One fact that is clear from the legislative history is that the committee reports relied upon by petitioners (Pet. 15) do not support petitioners' interpretation of the statute. First, the language relating to the fairness doctrine was added to the bill on the Senate floor; it was not present in the bill reported by either committee. The committee reports therefore are of little utility in interpreting that language. Second, the Senate committee report specifically states that "[i]n recommending this legislation, the committee does not diminish or affect in any way Federal Communications Commission policy or existing law

This Court discussed the legislative history of the 1959 amendment in its decision in *Red Lion Broadcasting Co.* v. *FCC, supra.* The questions before the Court in *Red Lion* were whether certain aspects of the fairness doctrine had been authorized by Congress and, if so, whether those provisions violated the First Amendment. The Court was not required to determine whether Congress in 1959 had enacted the fairness doctrine as positive law or simply recognized the Commission's authority to adopt the doctrine. In discussing the evolution of the portion of the 1959 amendment relating to the fairness doctrine, however, the Court described the original language in the Senate bill as "a positive statement of doctrine," and went on to state that the amendment "was altered to *the present merely approving language* in the conference committee" (395 U.S. at 383-384 (footnote omitted; emphasis added)). This statement indicates that the Court in *Red Lion* did not view the amendment as a statutory codification of the fairness doctrine. See also *id.* at 382 (stating that in the 1959 legislation Congress "expressly accepted" the FCC's construction of the public interest standard and that "the *public interest language* of the Act authorized the Commisson" to adopt the fairness doctrine) (emphasis added); Pet. App. 146a-149a (statement of Bork, J., on denial of suggestion for rehearing en banc) (discussing this Court's decision in *Red Lion*).

In sum, the language of the statute and the legislative history, as interpreted by this Court in *Red Lion,* indicate that Congress has not codified the fairness doctrine as positive law, and that the Commission retains its discretion to determine whether, in a given situation, application of the fairness doctrine comports with the public interest.

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which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy" (S. Rep. 562, 86th Cong., 1st Sess. 13 (1959)). The report therefore cuts against petitioners' interpretation of the statute.

2. Petitioners' extravagant assertions regarding the importance of the decision below (see Pet. 9-12) ignore the fact that the Commission's decision in this case is quite narrow. The Commission reaffirmed its intention "to pursue continued enforcement of these content-related broadcast laws, policies and rules until and unless they are altered by [the Commission] or by other competent authority" (Pet. App. 116a). All that the Commission decided here is that the fairness doctrine should not be *extended* to apply to a new service—teletext. And the limited effect of that determination is clear from the Commission's repeated recognition of the fact that teletext is a service that is still in its infancy. See Pet. App. 63a, 70a, 117a ("to date this service has not yet gone beyond the early experimental stage and * * * many of those who have made experimental offering of this service have not yet found a mix of offerings that appears clearly destined to find widespread consumer acceptance"). Because the effect of the Commission's decision here is quite limited, review by this Court is not warranted.[9]

Moreover, the Commission's determination that the fairness doctrine does not apply to teletext services does not leave licensees free to ignore issues of public importance. The Commission has made clear that all broadcast licensees have an obligation to present issue oriented or informational programming. See, *e.g., Radio Deregulation,* 84 F.C.C.2d 968, 982-983, on reconsideration, 87 F.C.C.2d 797 (1981), aff'd in relevant part *sub nom. Office of Communication* v. *FCC,* 707 F.2d 1413 (D.C. Cir.

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[9] As we discuss below (see pages 14-15), several pending judicial and administrative proceedings present questions regarding the continued application of the fairness doctrine to conventional broadcast services. In the event the Commission decides that the application of the doctrine in that context is no longer in the public interest, this Court would likely have an opportunity—on judicial review of those proceedings—to consider the legal issue presented in this case.

1983); *Commercial TV Stations,* 98 F.C.C.2d 1076, 1091-1092 (1984), petition for review pending, *Action for Children's Television* v. *FCC,* No. 86-1425 (D.C. Cir. filed July 25, 1986).

3. Finally, ongoing regulatory and legislative activity regarding the fairness doctrine makes it appropriate for the Court to stay its hand at this time. The Commission recently undertook a study of the fairness doctrine. It concluded that the doctrine is constitutionally "suspect" and that the doctrine disserves the public interest because "[i]nstead of furthering the discussion of public issues, [it] * * * inhibits broadcasters from presenting controversial issues of public importance" (*Fairness Doctrine Report,* 102 F.C.C.2d at 156, 187, 225). The Commission declined to take any action on the basis of this conclusion, explaining that, because of strong congressional interest in the matter, "it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the doctrine. Instead, we will afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding" (*id.* at 148). That determination is now pending on judicial review. See *Radio-Television News Directors Ass'n* v. *FCC,* No. 85-1691 (D.C. Cir. filed Oct. 22, 1985).

In addition, in *Meredith Corp.* v. *FCC,* 809 F.2d 863 (D.C. Cir. 1987), a case in which the FCC found a violation of the fairness doctrine, the court of appeals remanded the matter to the Commission with directions to consider the broadcaster's constitutional challenges to the enforcement of the doctrine unless the Commission concludes that "in light of its Fairness Report it may not or should not enforce the doctrine because it is contrary to the public interest" (809 F.2d at 874). Pursuant to that remand, the Commission has solicited public comment on whether continued enforcement of the fairness doctrine is

both permissible under the First Amendment and consistent with the public interest. See Syracuse Peace Council, 52 Fed. Reg. 2805 (1987).

Finally, Congress is actively considering legislation that would resolve the question presented in this case by amending the Communications Act to codify the fairness doctrine as it existed on January 1, 1987. The Senate adopted this legislation on April 21, 1987. See 133 Cong. Rec. S5218-S5232 (daily ed. Apr. 21, 1987). A companion bill already has been the subject of hearings in the House of Representatives. See H.R. 1934, 100th Cong., 1st Sess. (Apr. 2, 1987). Action by the House is expected during this session of Congress. See 133 Cong. Rec. D634 (daily ed. May 7, 1987) (noting that the bill was reported to the House Committee on Energy and Commerce by its Subcommittee on Telecommunications and Finance). If the statute is enacted into law, it will, of course, resolve the issue of statutory interpretation presented in this case.

In view of this ongoing legislative activity, the absence of a conflict among the courts of appeals, and the narrowness of the decision below, review by this Court is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
ARGUMENT	2
I. THE ISSUE PRESENTED DOES NOT WARRANT REVIEW BY THIS COURT	2
II. IN ANY EVENT, THIS CASE IS NOT THE APPROPRIATE VEHICLE FOR A DETERMINATION OF THE STATUTORY ISSUE	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases: Page

Ashwander v. TVA, 297 U.S. 288 (1936) 12
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).. 4, 8
FCC v. League of Women Voters, 468 U.S. 364 (1984) 4, 10
FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) 8-9
Larus & Brother Co. v. FCC, 447 F.2d 876 (4th Cir. 1971) 4
Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987) 11
Muir v. Alabama Educational Television Commission, 656 F.2d 1012 (5th Cir. 1981), *rehearing en banc*, 688 F.2d 1033 (1982), *cert. denied*, 460 U.S. 1023 (1983) 4
National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 9
Public Interest Research Group v. FCC, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976) 4, 5
Radio-Television News Directors Association v. FCC, 809 F.2d 860 (D.C. Cir. 1987) 11
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ..... *passim*
Stearns v. Hertz Corp., 326 F.2d 405 (8th Cir.), *cert. denied*, 377 U.S. 934 (1964) 6
United States v. Clark, 445 U.S. 23 (1980) 12

Administrative Decisions and Orders:

Complaint of Syracuse Peace Council, 52 Fed. Reg. 2805 (1987) 11
Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir), *cert. dismissed*, 281 U.S. 599 (1930) 3
Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 52 Fed. Reg. 7626 (1987).. 11

TABLE OF AUTHORITIES—Continued

Page

Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143 (1985), *petition for review filed sub nom. Radio-Television News Directors Association v. FCC*, No. 85-1691 (D.C. Cir., filed Oct. 22, 1985) 8, 10

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Joint Resolution Making Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-591, § 407 (1986) 11

47 U.S.C. § 315 (1982) ..... *passim*

Legislative Materials:

67 Cong. Rec. 5560 (1926) 2

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105 Cong. Rec. 14457 (1959) 7

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133 Cong. Rec. S5232 (daily ed. Apr. 21, 1987) 12

133 Cong. Rec. D670 (daily ed. May 13, 1987) 12

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H.R. Rep. No. 2106, 72d Cong., 2d Sess. (1933) 2

H.R. Rep. No. 802, 86th Cong., 1st Sess. (1959) 7

H.R. Rep. No. 1069, 86th Cong., 1st Sess. (1959), *reprinted at*, 105 Cong. Rec. 17777 (1959) 7

S. 742, 100th Cong., 1st Sess. (Mar. 12, 1987) 12

S. Rep. No. 772, 69th Cong., 1st Sess. (1926) 2

S. Rep. No. 781, 73d Cong., 2d Sess. (1934) 2

S. Rep. No. 562, 86th Cong., 1st Sess. (1959) 6

Political Broadcasting: Hearings Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess. (1959) 6

TABLE OF AUTHORITIES—Continued

Page

Political Broadcasts—Equal Time: Hearings on H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 86th Cong., 1st Sess. (1959) 6

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Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes,* 23 Fed. Comm. B.J. 75 (1969) 8

Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation,* 52 Minn. L. Rev. 67 (1967) 8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1371

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF BROADCASTERS IN OPPOSITION

Respondent National Association of Broadcasters respectfully requests that this Court deny the petition for a writ of certiorari filed herein on February 20, 1987, to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on September 19, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, reprinted as Petitioners' Appendix ("Pet. App.") A (pp. 1a-38a), has now been

reported at 801 F.2d 501. The opinion of the Court of Appeals denying Petitioners' suggestion for rehearing *en banc*, reprinted as Pet. App. E (pp. 137a-151a), has now been reported at 806 F.2d 1115.

ARGUMENT

I. THE ISSUE PRESENTED DOES NOT WARRANT REVIEW BY THIS COURT

The fairness doctrine requires broadcasters to provide coverage of controversial issues of public importance and to provide a reasonable opportunity for the presentation of contrasting views on those issues. The question which Petitioners have presented to this Court for review—whether the 1959 amendments to Section 315 of the Communications Act made the fairness doctrine a statutory requirement—should not be considered by this Court. The Court of Appeals' decision is fully consistent with decisions of this Court and of the only other circuit to consider this question, and the decision below is clearly correct.

When the Radio Act of 1927, the predecessor of the Communications Act of 1934, was enacted, it contained no fairness doctrine. To the contrary, Congress had rejected proposals to require the presentation of opposing views on public issues.[1] Although legislative efforts statutorily to require the doctrine continued to be defeated,[2] the Federal Radio Commission, predecessor of the Federal Communications Commission ("Commission" or "FCC"), began, as early as 1929, to develop on a case-by-case basis a concept of fairness in broadcasters' treatment of

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[1] *See* S. Rep. No. 772, 69th Cong., 1st Sess. (1926); 67 Cong. Rec. 5560 (1926).

[2] *See, e.g.*, H.R. Rep. No. 2106, 72d Cong., 2d Sess. 4 (1933); S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934); 78 Cong. Rec. 10988 (1934).

public issues.[3] The fairness doctrine was first articulated in its present form by the Commission in 1949 in its *Report on Editorializing*.[4] When Congress exempted news and news-related programs from the equal opportunities requirement of Section 315 of the Communications Act, it made reference to the fairness doctrine.[5]

The language and legislative history of these 1959 amendments were interpreted by this Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). There this Court rejected the contention that the fairness doctrine was not authorized by the public interest standard of the Comunications Act:

> "Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act *authorized* the Commission to require licensees to use their stations for discussion of public issues . . . ." [6]

At the same time the Court made plain that the 1959 amendments to Section 315 did not require the fairness doctrine. The Court found that the reference to the fairness doctrine in the 1959 amendments was an effort to "preserve" that administrative doctrine in the newly exempted areas: "Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts." [7] Specifically, the Court found that the defeated

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[3] *See, e.g., Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 599 (1930).

[4] 13 F.C.C. 1246 (1949).

[5] The text of Section 315 of the Communications Act is set out in the Petition for a Writ of Certiorari ("Pet.") at 2-3.

[6] *Red Lion*, 395 U.S. at 382 (emphasis supplied).

[7] *Id.* at 385. Elsewhere the Court stated that Congress had "ratified" the Commission's efforts. *Id.* at 381.

Proxmire amendment to the 1959 amendments, which would have "constituted a positive statement of the [fairness] doctrine," was altered "to the present *merely approving* language in the conference committee." [8]

In several subsequent decisions, this Court has reaffirmed its interpretation of the 1959 amendments. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (*"CBS v. DNC"*), for example, the Court stated that Congress, in 1959, had given "statutory approval" to the fairness doctrine,[9] and observed that the Commission "does not intend to discard" the doctrine,[10] thus suggesting that the Commission had authority to do so.[11] Similarly, in *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court stated that "the Commission may, in the exercise of its discretion, decide to modify or abandon these [fairness doctrine] rules," [12] again suggesting that the fairness doctrine was not a statutory requirement.

The only other circuit expressly to consider this question has concluded that the "fairness doctrine is not a creature of statute . . . ." [13] In *Public Interest Research*

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[8] *Id.* at 383-84 (emphasis supplied).

[9] 412 U.S. at 110 n.8.

[10] *Id.* at 132.

[11] In one place, however, the Court did refer to the fairness doctrine as a "statutory obligation" that was "imposed" by Congress. *Id.* at 129.

[12] 468 U.S. at 379 n.12.

[13] *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1066 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976). Although the Fourth Circuit in *Larus & Brother Co. v. FCC*, 447 F.2d 876, 882 (4th Cir. 1971), has stated in passing that Section 315 "provides a statutory basis" for the fairness doctrine, and the Fifth Circuit in *Muir v. Alabama Educational Television Commission*, 656 F.2d 1012, 1021 n.17 (5th Cir. 1981), *rehearing en banc*, 688 F.2d 1033 (1982), *cert. denied*, 460 U.S. 1023 (1983), has made reference in a footnote to the fairness doctrine's "codifi[cation]," neither of these cases contained any analysis of the statutory question nor was that question an issue in either case.

Group v. FCC, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), the First Circuit held that the Commission acted within its statutory authority when it excluded from the fairness doctrine those product commercials which did not explicitly address a public issue.[14] In rejecting the argument that Congress had " 'codified' both the fairness doctrine and the Commission's former application of it to product ads," the Court adopted the view that Congress, in 1959, merely "acknowledged and generally endorsed the Commission's adoption of fairness standards." [15]

The correctness of this view that the fairness doctrine is not a statutory requirement is confirmed by the language and legislative history of the statute.

The reference to the fairness doctrine in the 1959 amendments was in a proviso which stated:

> "*Nothing in the foregoing . . . shall be construed as relieving broadcasters*, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, *from the obligation imposed upon them under this chapter* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." [16]

Contrary to Petitioners' suggestion (Pet. 13), this language, by its terms, does not command compliance with, or enforcement of, the fairness doctrine. (Pet. App. A, 34a-35a.) Rather, the language states only that "the foregoing sentence"—containing the newly created equal time exemptions for news programs—should not be construed as also "relieving" broadcasters in the presentation of such news programs from the fairness obligations

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[14] 522 F.2d at 1066-67.

[15] *Id.* at 1066.

[16] 47 U.S.C. § 315(a) (1982) (emphasis supplied).

already "imposed upon them under this [Act]." This is the classic formulation of a "savings" clause or proviso.[17] As the Court below correctly found, this reference to fairness requirements " 'imposed . . . under the Act' . . . suggests that Congress viewed the doctrine as an obligation promulgated pursuant to authority conferred under the Act, specifically, the public interest mandate, and not as a fixed requirement frozen in place by the Act." (Pet. App. A, 35a.)

The legislative history confirms that this was the sole function of the language. During consideration of the 1959 amendments, both the Department of Justice and the Commission expressed concern that in exempting news programs from the statutory equal time requirements, Congress should not inadvertently suggest that the Commission's fairness doctrine would no longer apply to such broadcasts.[18] In response to these concerns, the Senate Committee stated in its report that it wished to make "crystal clear" that the amendment would not affect the Commission's existing policy.[19]

Senator Proxmire, however, was not content with this approach. During the floor debates on the Senate bill, he sought to make the fairness doctrine a congressional

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[17] *See* 2A Sutherland, *Statutory Construction* §§ 47.09, 47.12 (4th ed. 1984); *see also Stearns v. Hertz Corp.*, 326 F.2d 405, 407 (8th Cir.), *cert. denied*, 377 U.S. 934 (1964).

[18] *Political Broadcasting: Hearings Before the Communications Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 75, 309, & n.3 (1959); *Political Broadcasts—Equal Time: Hearings on H.R. 5389, H.R. 5675, H.R. 6326, H.R. 7122, H.R. 7180, H.R. 7206, H.R. 7602, H.R. 7985 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 13, 122 & n.6 (1959). There was no suggestion by either the Department or the Commission that Congress should act to codify the doctrine.

[19] S. Rep. No. 562, 86th Cong., 1st Sess. 13 (1959).

requirement and offered a modification that provided that nothing in the 1959 amendments to Section 315 should be construed to change *"the basic intent of Congress . . .* which recognizes that . . . all sides of public controversies *shall* be given as equal an opportunity to be heard as is practically possible" in all of the exempted categories of news programs.[20] With minor modifications, the Proxmire amendment was adopted and appeared in the final version of the Senate bill.[21]

The House substitute contained no provision comparable to the Proxmire amendment. Instead, the House bill, like the original Senate bill, simply exempted news programs from the equal time requirements of Section 315.[22] In conference, the Proxmire amendment was included in the final bill, but was modified to eliminate the statement ascribing the general fairness obligations to "the basic intent of Congress." Instead, as noted above, the final language referred to the fairness requirements as being "imposed . . . under" the Act. The conferees did not view themselves as enacting a new statutory obligation, but rather intended to recognize the Commission's authority to enforce the fairness doctrine under the Act and to ensure that the exemptions to Section 315 were not read to abrogate that authority.[23] As

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[20] 105 Cong. Rec. 14457 (1959) (emphasis supplied).

[21] *Id.* at 14457, 14463.

[22] H.R. Rep. No. 802, 86th Cong., 1st Sess. 2 (1959).

[23] *See* H.R. Rep. No. 1069, 86th Cong., 1st Sess. 4-5 (1959), *reprinted at* 105 Cong. Rec. 17777 (1959) (emphasis supplied); *see also* 105 Cong. Rec. 17778 (1959).

This view of the scope of the 1959 amendments to Section 315 has been shared by a 1968 congressional staff study, *see Staff Study of the House Comm. on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine,* 90th Cong., 2d Sess. 29 (1968) (the "suggest[ion] that Congress, in its enactment of the 1959 amendments, intended neither approval nor disapproval of the Fairness Doctrine, but intended to insure that Section 315 would

this Court concluded in *Red Lion*, the conferees modified the Proxmire Amendment from a "positive statement" to "merely approving language." [24]

Absent any clear expression of congressional intent to make the fairness doctrine a statutory requirement, it would be wholly inappropriate to view Congress as seeking inflexibly to codify Commission requirements such as the fairness doctrine when changing conditions might well make modification or abandonment of the requirements appropriate.[25]

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not interfere with it . . . appears to be a more accurate reading of the legislative history than the alternative one that Congress intended a complete codification of the doctrine"), and by several commentators, *see, e.g.*, Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 134 (1967) (concluding that 1959 amendments preserved but did not require the fairness doctrine); Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 Fed. Comm. B.J. 75, 81-82 (1969) (same).

Recently, the question of whether the fairness doctrine is a statutory requirement was considered by the Commission in its 1985 *Fairness Doctrine Report*. Although, after considering the legislative history of the 1959 amendments, the Commission declined to "reach a definitive conclusion" on whether retention of the doctrine statutorily was mandated, the Commission did conclude that there is "no evidence that clearly demonstrates an intent by Congress to codify the doctrine." *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 240, 246 (1985) ("*Fairness Doctrine Report*").

[24] *See supra* at pp. 3-4.

[25] *See* Pet. App. E, 151a (separate statement of Bork, J., supporting denial of rehearing *en banc*); *see also CBS v. DNC*, 412 U.S. at 122 (Commission requires "the flexibility to experiment with new ideas as changing conditions require"); *id.* at 118 (opinion of Burger, C.J.) (recognizing the importance of giving the Commission "flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing programs and needs"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593 (1981) (citation omitted) ("the public-interest standard of the Act [was designed to

II. IN ANY EVENT, THIS CASE IS NOT THE APPROPRIATE VEHICLE FOR A DETERMINATION OF THE STATUTORY ISSUE

A number of other important considerations strongly counsel in favor of denial of the writ.

First, this case arises in the context of the Commission's decision not to apply the fairness doctrine to teletext, a new technology which utilizes a previously unused portion of the television broadcast signal to transmit textual data and graphics, information which can be received with the use of a decoder. (Pet. App. A, 3a-4a.)

Assuming *arguendo* that Congress had intended in 1959 to make the fairness doctrine a statutory requirement as to general purpose broadcasting, there is no indication that Congress also intended to make the doctrine a statutory requirement for new technologies, such as teletext, which had not yet been developed and which have characteristics that differ substantially from traditional broadcasting.

In any event, teletext has been utilized in the United States only to a limited extent, generally on an experimental basis.[26] The application of the fairness doctrine to this new technology and the issue of whether the statute requires the fairness doctrine for teletext are not sufficiently important questions to warrant review by this Court.

Second, the fairness doctrine raises substantial constitutional questions. Although this Court's decision in *Red Lion* held that the fairness doctrine was constitu-

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serve as] 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy' "); *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

[26] *In the Matter of Amendment of Parts 2, 73 and 76 of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations*, BC Docket No. 81-741 (released Jan. 24, 1985), reprinted as Pet. App. C, at 117a.

tional, this question is now properly being reconsidered. In *Red Lion*, this Court recognized the appropriateness of reexamining the doctrine's constitutionality if it were shown to have inhibitory effects.[27] And, in *League of Women Voters*, this Court explained that it would reconsider the question of the doctrine's constitutionality if given a "signal" by the Commission that the doctrine inhibited broadcaster speech or that "technological developments" made revision to the system of broadcast regulation appropriate.[28]

In 1985, after an exhaustive inquiry into the constitutionality and desirability of the fairness doctrine, the Commission gave this Court such a "signal." In its comprehensive *Fairness Doctrine Report*, the Commission found that the fairness doctrine substantially inhibits the broadcasting of controversial issues, is unnecessary, and is unduly intrusive into broadcaster editorial judgment.[29] Based on these findings, the Commission decided that the doctrine is constitutionally "suspect" [30] and concluded:

> "[w]ere the balance ours alone to strike, the fairness doctrine would . . . fall short of promoting those interests necessary to uphold its constitutionality." [31]

This conclusion was based on the extensive record evidence before the Commission and on the Commission's years of experience in enforcing the doctrine.

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[27] 395 U.S. at 373.

[28] 468 U.S. at 377 n.11, 378-79 n.12.

[29] 102 F.C.C.2d at 156.

[30] *Id.*

[31] *Id.* In this *Report*, the Commission also found that the fairness doctrine no longer served the public interest. The Commission announced, however, that it would continue to administer and enforce the fairness doctrine given the "intense Congressional interest in the fairness doctrine and the pendency of legislative proposals" to repeal the doctrine. *Id.* at 247.

The question of whether the FCC constitutionally can continue to enforce the doctrine in light of these findings is now the subject of at least one proceeding at the Commission [32] and is pending before the Court of Appeals for the District of Columbia Circuit.[33]

The serious First Amendment concerns raised by the application of the fairness doctrine to the traditional broadcast media should be taken into consideration by this Court in determining whether Section 315 made the fairness doctrine a binding statutory requirement since

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[32] Following the Court's decision in *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), discussed *infra* at note 33, the Commission initiated a proceeding to determine whether the Commission should eliminate the fairness doctrine, *inter alia*, on constitutional grounds. *See Complaint of Syracuse Peace Council*, 52 Fed. Reg. 2805 (1987). The Commission is also conducting an inquiry into fairness doctrine enforcement alternatives mandated by Congress in the Joint Resolution Making Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-591, § 407 (1986). *See Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 52 Fed. Reg. 7626 (1987).

[33] The Commission's actions in this *Report* are currently on review in the District of Columbia Circuit in *Radio-Television News Directors Association v. FCC*, No. 85-1691 (filed Oct. 22, 1985) (*"RTNDA"*). Although a panel of that Court originally concluded that it did not have jurisdiction to consider Petitioners' claim that, in light of these findings, the Commission's decision to continue to enforce the fairness doctrine and to decline to take action to eliminate the doctrine was unconstitutional, *RTNDA*, 809 F.2d 860, 863 (D.C. Cir. 1987), the panel has ordered rehearing of this jurisdictional question. Consideration of the merits of this case has been postponed pending completion of the Commission's proceeding on remand in *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), a companion case to *RTNDA*, in which the Court of Appeals held that the Commission had no discretion to decline to consider an argument by a broadcaster held to have violated the fairness doctrine that the agency could not constitutionally enforce the doctrine against it.

this Court routinely construes statutes to avoid passing on their constitutionality.[34] This case does not directly present these constitutional issues.

Moreover, the record on the constitutionality of the fairness doctrine has been developed in the context of general purpose broadcasting, which has characteristics that differ significantly from those of teletext. The question of whether the fairness doctrine is a statutory requirement is thus more appropriately considered by this Court in a case in which the constitutionality of the doctrine is directly presented and which involves its application to traditional broadcasting.

Third, considerations of judicial economy also militate in favor of a denial of the petition. The statutory question presented in this case as to the effect of the 1959 amendments to Section 315 would become moot if Congress enacted legislation making the fairness doctrine a statutory requirement.

Following the Court of Appeals' decision in this case, bills were introduced in the House and the Senate statutorily to require the fairness doctrine.[35] This legislation was approved by the Senate on April 21, 1987.[36] The Telecommunications and Finance Subcommittee of the House Energy and Commerce Committee held hearings on this legislation on April 7, 1987, and the full Committee ordered the bill reported on May 13, 1987.[37]

Should this legislation be enacted into law, the statutory issue currently before this Court would be rendered

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[34] *See United States v. Clark*, 445 U.S. 23, 27 (1980); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1935) (Brandeis, J., concurring).

[35] S. 742, 100th Cong., 1st Sess. (Mar. 12, 1987) (sponsored by Sen. Hollings); H.R. 1934, 100th Cong., 1st Sess. (Apr. 2, 1987) (sponsored by Rep. Dingell).

[36] 133 Cong. Rec. S5232 (daily ed. Apr. 21, 1987).

[37] 133 Cong. Rec. D670 (daily ed. May 13, 1987).

moot. Moreover, even if this legislation were not enacted into law, there are at least two other cases pending in the court of appeals and at the Commission which present the issue of whether the 1959 amendments to Section 315 made the fairness doctrine a statutory requirement in the context of traditional broadcasting.[38] In light of these considerations, the Court should decline to exercise its discretion to hear this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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[38] *See supra* notes 32 & 33.

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No. 86-1371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TELECOMMUNICATIONS RESEARCH AND ACTION CENTER and MEDIA ACCESS PROJECT,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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ARGUMENT

We agree with the Federal respondents that there is one new development subsequent to the filing of the petition—significant Congressional action—that the Court should take into account. On April 21, 1987, the Senate passed S. 742 to "clarify" its intent and codify the fairness doctrine, S. Rept. No. 100-34, 100th Cong., 1st Sess., at 1, and the House is well on its way to passing identical legislation, H.R. 1934, 100th Cong., 1st Sess.[1] This legislative process confirms our position that the "Fairness Doctrine is at the heart of [the public trust] obligations . . .," S. Rept. No. 100-34, *supra*, p.33, and that the decision below thus undermines the public trustee concept in the broadcast field.[2]

Furthermore, the prompt Congressional action decidedly repudiates respondents' strained attempt to pass off that decision as a narrow ruling confined to teletext.[3] The court of appeals and the Commission have also fully recognized that the decision impacts

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[1] See 133 Cong. Rec. S5218-S5232 (daily ed. Apr. 21, 1987; 133 Cong. Rec. D634 (daily ed. May 7, 1987).

[2] The Senate Report notes that the issue is now before this Court, stating (*id.* at 3):

> "It should be noted that the Committee believes the Court of Appeals decision wrongly interpreted the 1959 amendments and that the Congress did explicitly place the Fairness Doctrine in the Communications Act at this time. While the Committee urges the U.S. Supreme Court to reverse the lower court's holding it cannot risk a contrary result. That is why it is essential that this legislation proceed."

[3] Indeed, the court below only reached the issue of Congressional intent with respect to fairness because it first found that teletext is broadcasting, a holding respondents do not mention.

general broadcasting. In *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), raising First Amendment questions upon a Commission fairness ruling against a television station, the court remanded the case for consideration of the constitutional issues, stating (*id.* at 873, n.11) that after the court's decision herein removing the statutory impediment, the Commission could no longer refrain from consideration of the constitutional issues, unless it resolved the matter on public interest grounds. In response, the Commission requested general public comment on the constitutionality of the fairness doctrine and on whether its enforcement is contrary to the public interest. *Order* in re Complaint of Syracuse Peace Council, FCC 87-33, 52 Fed. Reg. 2805 (Jan. 27, 1987).

We suggest that the Court withhold action on the pending petition until the legislative process has run its full course, probably by mid-summer. If the bills become law, the petition should of course be denied or dismissed as moot. But if the legislation fails because of a Presidential veto and failure to override, the important issue raised remains pertinent. In that event, we urge that certiorari should be granted and that the case for summary reversal remains strong in light of the controlling decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

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